(8)

No. 95-853-CSX Title: M. L. B., Petitioner
v.
S. L. J., Individually and as Next Friend of the Minor Children, S. L. J. and M. L. J., et ux.

Docketed:
December 1, 1995 Court: Supreme Court of Mississippi

Entry	Date	Proceedings and Orders
	Nov 29 1995	Petition for writ of certiorari filed. (Response due December 31, 1995)
	Dec 14 1995	Waiver of right of respondent Mississippi to respond filed.
	Jan 3 1996	DISTRIBUTED. January 19, 1996
	Jan 16 1996	Response requested. (Due February 20, 1996)
	Feb 20 1996	Brief of respondent State of Mississippi in opposition filed.
	Feb 28 1996	Reply brief of petitioner filed.
	Mar 6 1996	REDISTRIBUTED. March 22, 1996
	Mar 25 1996	REDISTRIBUTED. March 29, 1996
	Apr 1 1996	Petition GRANTED. SET FOR ARGUMENT October 7, 1996. **********
	Apr 15 1996	Order extending time to file brief of petitioner on the merits until May 31, 1996.
	Apr 29 1996	Motion of petitioner to dispense with printing the joint appendix filed.
	May 13 1996	Motion of petitioner to dispense with printing the joint appendix GRANTED.
	May 31 1996	Brief of petitioner M.L.B. filed.
	May 31 1996	Brief amici curiae of National Center for Youth Law, et al. filed.
	Jun 28 1996	Brief of respondents S.L.J., et al. filed.
	Jul 19 1996	Record filed.
	Jul 29 1996	CIRCULATED.
	Jul 31 1996	Reply brief of petitioner filed.
	Oct 7 1996	ARGUED.

No. 95-853

In The

Supreme Court of the United States

October Term, 1995

M.L.B.,

Petitioner,

vs.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Mississippi

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a State that provides appeals as a matter of right from adverse lower court decisions terminating parental rights, may the State, consistent with the due process and equal protection clauses of the Fourteenth Amendment, condition those appeals upon a parent's ability to pay appeal fees in excess of two thousand dollars?

PARTIES

Due to certain provisions of Mississippi law regarding appeals involving minors, initials were used to denote the parties in the appeal to the Supreme Court of Mississippi. However, the parties' full names are contained in the pleadings of the Chancery Court of Benton County, Mississippi, see Pet. App. 8.

Defendant/Counter-Plaintiff/Appellant: M.L.B.

Plaintiffs/Counter-Defendants/Appellees: S.L.J., individually and as next friend of his minor children, S.L.J. and M.L.J., and his wife, J.P.J.

The Defendant/Counter-Plaintiff/Appellant is the Petitioner here.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, M.L.B., whose parental rights to her children were terminated by the Chancery Court of Benton County, Mississippi, respectfully requests that a writ of certiorari issue to the Supreme Court of Mississippi, which refused to permit her appeal from the adverse termination decision because of her financial inability to pay to the Court appeal fees, including record preparation fees, in excess of two thousand dollars. This was done pursuant to the Mississippi Supreme Court's uniform practice of automatically prohibiting any sort of in forma pauperis appeal in a civil case, regardless of the subject matter of the case or the interests that are implicated. See, *Moreno v. State*, 637 So.2d 200 (Miss. 1994) (in forma pauperis appeals are not permitted in civil cases); *Nelson v. Bank of Mississippi*, 498 So.2d 365 (Miss. 1986) (same); *Life & Cas. Ins. Co. v. Walters*, 200 So. 732 (Miss. 1941) (same).

OPINIONS BELOW

The August 31, 1995 order of the Supreme Court of Mississippi dismissing the petitioner's appeal is unreported and is reproduced in the appendix to this petition, p. 1. The related August 18, 1995, July 10, 1995, and June 5, 1995 orders of the Supreme Court of Mississippi are unreported and are reproduced in Pet. App. 3, 4, and 6, respectively. The December 14, 1994 order of the Chancery Court of Benton County terminating the parental rights of petitioner is unreported and is reproduced at Pet. App. 8.

JURISDICTION

The judgment of the Supreme Court of Mississippi dismissing the petitioner's appeal was issued on August 31, 1995. Pet. App. 1. The mandate of the Supreme Court of Mississippi, which is dated September 21, 1995, confirms that the date of the dismissal was August 31, 1995. Pet. App. 2. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257. Because this petition involves a challenge to the uniform practice of the Supreme Court of Mississippi that precludes in forma pauperis civil appeals in all cases, this petition is being served on the Attorney General of Mississippi. See Rule 29.4(c) of the Rules of this Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which reads in relevant part as follows:

> Amendment XIV:
>
> . . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner M.L.B. and respondent S.L.J. had been married as wife and husband, but were divorced on June 9, 1992, with their two children remaining in the custody of S.L.J., their father. Less than three months later, on September 4, 1992, S.L.J. remarried, this time to respondent J.P.J. Just over one year later, on November 15, 1993, respondents S.L.J. and J.P.J. filed this case in the Chancery Court of Benton County, Mississippi, seeking to terminate the parental rights of petitioner M.L.B., who is the natural mother of the children, and to have J.P.J. take her place by adopting the children. M.L.B. responded with a counterclaim seeking primary custody of the children and seeking to have S.L.J. held in contempt of court for his refusal to permit reasonable visitation.

Under Mississippi law, a person's parental rights cannot be terminated absent clear and convincing evidence that the parent either abandoned or abused the child or is so unfit as to warrant termination. Miss. Code Ann., §§ 93-15-103, 93-15-109. Despite this high burden of proof, the Chancery Court, after a contested trial on the merits, issued an order effective December 12, 1994, entered nunc pro tunc on December 14, 1994, terminating the parental rights of petitioner M.L.B. and in her stead allowing J.P.J. to adopt the children. Pet. App. 8. In the order, the Chancellor cited no specific evidence to support the decision, but merely issued a conclusory statement parroting the statutory language. Pet. App. 9-10.

In Mississippi, an appeal of right can be taken from all lower court judgments, civil as well as criminal. The appeal is to be filed initially with the state Supreme

Court, which determines after briefing whether to retain the case for decision or to send it to the intermediate Mississippi Court of Appeals. Rules 16, 17, M.R.A.P.

Petitioner M.L.B. filed a timely notice of appeal to the Mississippi Supreme Court on January 11, 1995. Pet. App. 13. Although she paid the $100 filing fee for the appeal, she was unable to obtain the funding to pay the remaining costs required for the appeal to proceed. The Clerk of the Chancery Court estimated the cost of preparing and transmitting the record to be $2,352.36, which included $1,900.00 for the transcript (950 pages at $2.00 per page), $438.00 for the other papers in the record (219 pages at $2.00 per page), $4.36 for binders, and $10.00 for mailing. Pet. App. 15. Under Mississippi law, the advance payment of these fees is a prerequisite to proceeding with an appeal. Rules 10(b)(1)-(2), 11(b)(1), M.R.A.P.[1]

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[1] Rule 11(b)(1), M.R.A.P., requires the petitioner to pay in advance for the transcript as well as other necessary portions of the record. The per page costs of the transcript and the papers from the record are set by statute. Miss. Code Ann. §§ 25-7-1, 25-7-13(6). Rule 10(b)(2), M.R.A.P., requires that a transcript be prepared if the appellant "intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence." In this case, the primary error that the petitioner intended to urge on appeal was that the Chancery Court's decision terminating her parental rights was unsupported by, and contrary to, the evidence presented. This is denoted in the statement of issues for appeal, which was filed in the Chancery Court pursuant to Misssippi practice. Rule 10(c), M.R.A.P., provides a procedure for preparing the record "[i]f no stenographic report or transcript . . . is available," but this procedure applies only if the court reporter's notes are lost or stolen or if the court reporter failed to transcribe an important portion of any trial or hearing. Luther T. Munford, *Mississippi Appellate Practice*, § 7.6 (1995). Rule 10(d), M.R.A.P., permits parties to an appeal to forego the transcript if they can agree on a written "statement of the case . . . setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented," but that was simply not an option in the present case, which involved a protracted and hotly contested evidentiary battle. As this Court noted in the context of a criminal case, "[a] defendant who claims the right to a free transcript does not, under our cases, bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight." *Britt v. North Carolina*, 404 U.S. 226, 230 (1971). *See also, Mayer v. City of Chicago*, 404 U.S. 189, 190, 195, 198 (1971) (where a criminal defendant appealed on sufficiency of evidence grounds, he "ma[d]e out a colorable need for a complete transcript" and the burden was on his opponent to demonstrate that an alternative would suffice for an effective appeal).

On July 10, 1995, the Mississippi Supreme Court issued an order requiring the appellant, within fourteen days, to comply with certain prerequisites before the appeal could proceed. Pet. App. 4. The appellant met all of these requirements, except that of paying the $2,352.36 in appeal costs. Instead, on July 24, 1995 – fourteen days after the Court's July 10 order – she filed in the Chancery Court of Benton County a motion for leave to appeal in forma pauperis. Pet. App. 17. Attached to that motion was an affidavit of indigency showing that her limited financial means rendered her unable to pay the appeal costs. On July 27, 1995, she filed in the Supreme Court of Mississippi a motion to suspend rules, for leave to appeal in forma pauperis, and to brief the issue of in forma pauperis appeals. Pet. App. 19.

These two motions raised the federal constitutional issues that are now being presented to this Court. The July 24 Chancery Court motion, which was attached to and incorporated in the July 27 Mississippi Supreme Court motion, noted that Mississippi Supreme Court precedent prohibited in forma pauperis appeals in civil cases. Pet. App. 17-18, *citing, Nelson v. Bank of Mississippi*, 498 So.2d 365 (Miss. 1986); *Life & Cas. Ins. Co. v. Walters*, 200 So. 732 (Miss. 1941). However, the motion contended that the failure to permit the appeal because of the inability to pay the appeal costs, coming in a case involving the termination of the fundamental rights of a parent, would violate both the state and federal constitutions. More specifically, the motion stated:

> [W]here the State's judicial processes are invoked to secure so severe an alteration of a litigant's fundamental rights – the termination of the parental relationship with one's natural child – basic notions of fairness, justice, of equal protection under the law, and of substantive and procedural due process, protections guaranteed by this State's Constitution and the Constitution of the United States, require that a person be afforded the right of appellate review though one is unable to pay the costs of such review in advance.

Pet. App. 18.

The July 27 Supreme Court motion incorporated the July 24 Chancery Court motion, and added that the termination of parental rights "implicates a fundamental interest protected both by the Fourteenth Amendment to the U.S. Constitution and Article 3, Section 14 of the Mississippi Constitution." Pet. App. 20. It further stated:

> The denial because of the indigency of the appellant of the right to review in a case involving such a . . . fundamental interest . . . appears to be a violation of the requirement of due process and a denial of equal protection under the law. . . .

Id., citing, Santosky v. Kramer, 455 U.S. 745, 758-759 (1982), and *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). Accordingly, the federal issues were properly raised by these two motions in the Mississippi courts, one of which was filed in the Chancery Court and both of which were filed in the Mississippi Supreme Court. *See, Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 159 n.5 (1980).

On August 18, 1995, the Supreme Court of Mississippi issued an order denying the motion to suspend rules, for leave to appeal in forma pauperis, and to brief the issue of in forma pauperis appeals. The Court's sole basis for denying the motion was the following:

> The appellant claims he [sic] is unable to pay the costs of appeal and that the Court should suspend the rules and allow the appellant to proceed in forma pauperis. The motion asks permission to brief the issue of in forma pauperis appeals. The right to proceed in forma pauperis in civil cases exists only at the trial level. *Moreno v. State*, 637 So.2d 200 (Miss. 1994). *See also Nelson v. Bank of Mississippi*, 498 So.2d 365 (Miss. 1986); *Life and Casualty Ins. Co. v. Walters*, 190 Miss. 761, 772-74, 200 So. 732, 733-34 (1941). The Court finds that the motion should be denied.

Pet. App. 3. On August 31, 1995, the Supreme Court of Mississippi ordered the appeal finally dismissed. Pet. App. 1-2. This petition follows.[2]

REASONS FOR GRANTING THE WRIT

Section I of the remainder of this petition discusses the importance of the federal question at issue here, as well as the conflict between the decision of the Supreme Court of Mississippi and the reasoning of at least two of this Court's prior decisions. Section II discusses the conflict between, on one hand, the decision of the Supreme

[2] Throughout this litigation, the petitioner has been represented by pro bono counsel. Danny Lampley originally began representing the petitioner when he was a staff attorney for North Mississippi Rural Legal Services (NMRLS). Because of the petitioner's poverty, she was eligible for representation by that organization. After Mr. Lampley left NMRLS for private practice during the course of the Chancery Court proceedings, he retained the case pro bono because NMRLS did not have a sufficient number of attorneys for someone else to take over the case. Although Mr. Lampley later asked NMRLS to pay the appeal costs, and although Rule 1.8(e)(2) of the Mississippi Rules of Professional Conduct permitted NMRLS to do so, it did not because of constraints on its own budget. This is denoted in the record, in Exhibit B to the modified motion for leave to withdraw from representation, which was filed in the Mississippi Supreme Court so that NMRLS could withdraw after having determined that it was not in a position financially to carry the appeal. The Mississippi Supreme Court permitted NMRLS to withdraw from the case. Pet. App. 6. Because of the importance of the constitutional issue in this case, the American Civil Liberties Union of Mississippi is paying for the expense of filing this petition for certiorari with this Court.

Court of Mississippi and, on the other, the decisions of several other state supreme courts and at least one federal court of appeals. Before turning to those, however, it is important to note that even though this case involves private litigants, the Supreme Court of Mississippi's decision to dismiss the petitioner's appeal for nonpayment of the fees implicates state action and is therefore reviewable under the Fourteenth Amendment. This is clear from a number of cases in which this Court has reviewed state appellate procedures under the Fourteenth Amendment in cases between private litigants. *See, e.g., Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Lindsey v. Normet*, 405 U.S. 56 (1972).

I. THE DECISION OF THE SUPREME COURT OF MISSISSIPPI RAISES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW, AND CONFLICTS WITH THE REASONING OF THIS COURT'S DECISIONS IN *GRIFFIN v. ILLINOIS*, 351 U.S. 12 (1956), AND *BODDIE v. CONNECTICUT*, 401 U.S. 371 (1971).

Under its precedent and practice, as explained in the August 15, 1995 order in this case, the Mississippi Supreme Court does not permit any sort of in forma pauperis civil appeals. This is true no matter the importance of the interest involved. Payment for preparation of the record and the transcript must be made in advance, M.R.A.P. 11(b)(1), and sometimes runs into the thousands of dollars, as in the present case. The Mississippi Supreme Court's inflexible practice precludes any consideration of whether a prospective appellant can afford to pay the relevant fees. Moreover, it prevents consideration

not only of whether an appellant should be required to pay any fees at all, but also consideration of partial measures, such as whether an appellant should be required to pay only a portion of the fees, or whether an appellant should be required to pay all of the fees, but in installments. While the Mississippi Supreme Court's practice may not raise constitutional problems in many civil cases, it does here, where the fundamental rights of a parent's relationship to her children are at issue.

Over the years, this Court has issued a series of decisions relating to the right of access to courts of those who are not sufficiently well off financially to pay the fees and costs normally charged by the court systems. These decisions are at odds with the ruling of the Supreme Court of Mississippi in the present case.

In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court noted that a state is not required by the Constitution to provide an appeal, but went on to hold that where a state does so in criminal cases, it also must provide indigent persons a transcript, or its equivalent, at state expense so they can take advantage of the appeal option irrespective of their financial poverty. This result, said the Court in *Griffin*, is compelled by the due process and equal protection clauses of the Fourteenth Amendment. *Id.* at 18-20. In its opinion, the Court stated:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.

Id. at 18.

In cases after *Griffin*, this Court has invalidated a number of state practices and statutes that deny indigent criminal defendants access to effective appeals because of their inability to pay for transcripts. Among these cases is *Mayer v. Chicago*, 404 U.S. 189 (1971), which held that an indigent had the right to provision of a transcript for appeal in a case where he was faced not with imprisonment, but merely with a $500 total fine for two misdemeanor offenses.

Fifteen years after *Griffin*, this Court's decision in *Boddie v. Connecticut*, 401 U.S. 371 (1971), extended much of the rationale of *Griffin* to civil cases involving fundamental rights. *Boddie* held that the due process clause does not permit a sixty dollar court costs fee to be imposed, as a condition for filing a civil court divorce petition, upon those who cannot afford it. As Justice Harlan's opinion for the Court in *Boddie* explained: "In *Griffin* it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process." 401 U.S. at 382. Connecticut's $60 divorce filing fee does the same thing, said the Court in *Boddie*, adding that "the rationale of *Griffin* covers this case." 401 U.S. at 382. While *Griffin* was predicated both upon the due process and equal protection clauses, *Boddie* relied specifically upon the due process clause, holding that it is violated by the application to indigents of a monetary fee that prevents them from access to the courts in a matter involving a fundamental interest such as marriage:

> [G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship,

> due process does prohibit a state from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

401 U.S. at 374. The Court in *Boddie* also explained that its decision was premised on the fact that resort to the courts was the only means by which people could seek lawful dissolution of their marriages. *Id.* at 376-377.

The decision of the Supreme Court of Mississippi in the present case conflicts with the rationales of *Griffin* and *Boddie*. As in *Griffin*, the petitioner here was prevented from taking an appeal of right – an appeal that is available to others – because she cannot afford the fees for preparing the transcript and the record. Her interest – the interest of a parent in her natural and lawful relationship with her child – is one of the most important interests that can be adjudicated in a court of law. It is at least equivalent to the marriage relationship in *Boddie*, may well be as important as the interest in physical liberty implicated by *Griffin*, and is far more important than the monetary fine and misdemeanor conviction involved in *Mayer*. This Court in *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1991), noted that the parent's interest in resisting a termination of parental rights is a "commanding" one, and this Court's decision in *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), described the interest of "persons faced with forced dissolution of their parental rights" as a "fundamental liberty interest." As Justice Stevens has noted:

> A woman's misconduct may cause the State to take formal steps to deprive her of her liberty. The State may incarcerate her for a fixed term

> and also may permanently deprive her of her freedom to associate with her child. . . . Although both deprivations are serious, often the deprivation of parental rights will be the more grievous of the two.

Lassiter v. Department of Social Services, 452 U.S. at 59 (Stevens, J., dissenting).

The present case also is like *Boddie* in the sense that – just as the courts in Connecticut were the only means for seeking a lawful divorce – a chancery court adjudication is the *only* means by which a natural parents' rights can be terminated under Mississippi law, and an appeal is the *only* means by which an aggrieved parent can challenge such a termination. Absent such an appeal, a Mississippi chancery court decision has the same effect as the trial court decision in *Santosky* – the "decision terminating parental rights is *final* and irrevocable." 455 U.S. at 745 (emphasis in original).

Moreover, under Mississippi law, the appeal plays an integral role in insuring that parental rights are not wrongfully terminated. Consistent with this Court's ruling in *Santosky*, Mississippi has, by statute, adopted the clear and convincing standard of proof before any termination can be ordered, Miss. Code Ann. § 93-15-109. The Mississippi Supreme Court has jealously guarded that standard through detailed appellate review of the evidence. In discussing the clear and convincing standard in parental termination cases, the Court said: "This Court has not been reluctant to reverse the lower court when the required burden of proof has not been met." *Vance v. Lincoln County DPW*, 582 So.2d 414, 417 (Miss. 1991).

The Mississippi Supreme Court's searching review has been exemplified in a number of cases, including *Petit v. Holifield*, 443 So.2d 874 (Miss. 1984), where the Court discussed the proof regarding the natural father, who was the defendant in that case:

> [He] does . . . come close [to meeting the clear and convincing standard] and is 'teetering' on the brink. . . . [If] circumstances continue without improvement over a substantial period of time in the future [his parental rights should be terminated]. . . . He is hardly an ideal parent.

Id. at 878-879. Despite the closeness of that case and the parental deficiencies of the natural father, the Mississippi Supreme Court in *Petit* reversed the Chancery Judge's finding of clear and convincing evidence, holding that the proof – while close – did not meet the required standard.

These cases demonstrate that, in Mississippi, the appeal from a termination of parental rights is not simply a formality, but instead is a meaningful opportunity for a parent to challenge the evidence and the lower court's findings and, quite possibly, to regain the parental relationship with his or her child. This would be particularly true in the present case, where the petitioner contested the respondent's evidence and presented compelling evidence of her own, and where the Chancery Court's termination order contained no discussion of the evidence and no specific factual findings to support the termination. Pet. App. 8. For someone like the petitioner, the appeal of right provided by Mississippi law is likely her best and last hope to retain her rights as a parent.

Returning to the discussion of *Boddie*, it is, of course, true that *Boddie* did not involve an appeal. But its invocation of the *Griffin* rationale – which did involve an appeal – demonstrates that the Fourteenth Amendment concerns underlying both cases apply also to a situation such as the present case, where a civil defendant facing deprivation of the fundamental rights of a parent is precluded from access to an appellate court that is open by right to those who can afford it. Indeed, in *Lindsey v. Normet*, which is a civil case, this Court specifically noted that "[w]hen an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating [the Fourteenth Amendment]." 405 U.S. at 77.

This is consistent with the opinion by then-Justice Rehnquist for this Court in *Ross v. Moffitt*, 417 U.S. 600 (1974), which explained that the *Griffin* line of cases involves the right of an indigent person to get his or her foot in the appellate courthouse door. According to the Court in *Ross*, those cases "stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons." 417 U.S. at 607. While this Court's opinion in *Ross* held that the Fourteenth Amendment does not require the provision of counsel for a discretionary second appeal within a state system or a petition for certiorari to this Court, it specifically contrasted the basic sort of access to appellate courts represented by *Griffin* with the distinct line of right-to-counsel cases:

> The fact that an appeal *has* been provided does not automatically mean that a State then acts

> unfairly by refusing to provide counsel to indigent defendants at every stage of the way. . . . Unfairness results only if indigents are singled out by the State and denied *meaningful access* to the appellate system because of their poverty.

Id. at 611 (first emphasis in original, second emphasis added). Thus, added the Court in *Ross*:

> [The Fourteenth Amendment] does require that the state appellate system be "free of unreasoned distinctions," *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966), and that indigents have an adequate opportunity to present their claims fairly within the adversary system.

Id. at 612.

Indigents clearly have a right to access to existing appellate avenues even in situations where they do not have a right to appointed counsel. Indeed, the right of access to appellate courts through provision of a transcript to those who otherwise cannot afford it is far broader than any right to counsel. *Compare, Mayer v. Chicago* (transcript must be provided to indigent seeking to appeal a misdemeanor conviction with no sentence of imprisonment and only a $500 fine) with *Scott v. Illinois*, 440 U.S. 367 (1979) (no right to counsel for a misdemeanor offense that does not lead to imprisonment), and *Long v. District Court of Iowa*, 385 U.S. 192 (1966) (transcript of habeas corpus hearing must be provided to indigent seeking to appeal denial of habeas relief) with *Murray v. Giaratano*, 481 U.S. 551 (1987) (no right to counsel on state habeas corpus review, even in death penalty cases).

Because the decision of the Supreme Court of Mississippi in the present case cuts off access to the appellate courts for indigents, in a case involving the fundamental rights of a parent, it conflicts with the reasoning of the *Griffin* line of cases and of *Boddie v. Connecticut*.

Beyond that, even if the Mississippi Supreme Court's decision were deemed not necessarily to conflict with those cases, it nevertheless raises an important issue of federal constitutional law that should be addressed by this Court. While *Griffin*, *Boddie*, and the rationale explained in *Ross* all bear on this issue, this Court has never decided a case raising the precise question of access to an appellate court in a civil matter involving a fundamental right such as that implicated by a termination of parental rights.

Certainly, it did not do so in *Ortwein v. Schwab*, 410 U.S. 656 (1973), which upheld the imposition upon an indigent of a $25 filing fee required to seek judicial review of an administrative reduction in old-age assistance, or in *United States v. Kras*, 409 U.S. 434 (1973), which concluded that the Fourteenth Amendment permits the application of a $50 bankruptcy filing fee to an indigent. In both cases, the Court specifically noted that the interests involved are not of the same constitutional magnitude as the marriage interest implicated in *Boddie*. *Ortwein*, 410 U.S. at 659; *Kras*, 409 U.S. at 445. Moreover, *Ortwein* involved only a $25 filing fee, while *Kras* involved a $50 filing fee, which could be paid in several installments of $1.28 per week. 409 U.S. at 449. These cases are a far cry from present case, which involved fundamental parental rights that can be asserted on

appeal only by payment of fees of over $2,000, which must be paid all at once and all in advance.

This Court did address, in *Lassiter*, what it called the "commanding" interest that a parent has in his or her parental rights. 452 U.S. at 27. In that case, the Court held that due process does not require appointed counsel for indigent parents in every case involving a potential termination of parental rights. However, said the Court, in light of the importance of the interest, there will be some parental termination cases in which due process will require the appointment of counsel. *Id.* at 31-32. Accordingly, said the Court, there must be in the state courts, at the very least, a case-by-case decision as to "whether due process calls for the appointment of counsel for indigent parents in termination proceedings," with the question "to be answered in the first instance by the trial court, subject, of course, to appellate review." *Id.* at 32. Four dissenting Justices contended that due process requires the appointment of counsel in all such cases.

Lassiter's holding does not by itself answer the question of whether a transcript must be provided to indigent appellants in all parental termination cases. As noted previously in this petition, the right to access, through a transcript on appeal when necessary, is far broader than any right to counsel. As this Court explained in *Ross v. Moffitt*, the poor are not permitted all of the advantages in the court system possessed by those who are wealthier, but the poor are constitutionally entitled at least to access to the same courts that are open to the wealthy. In other words, when fundamental rights are at stake, a poor person is entitled to get his or her foot in the same courthouse door that is open to those with more money,

even if he or she is not always able to do it with an attorney.

Even in terms of the right to counsel, *Lassiter* held that the interest affected by the potential termination of parental rights is sufficiently important that state courts must, under the due process clause, either provide counsel to indigents in all cases or make a case-by-case determination as to whether the appointment of counsel is necessary. Because of the importance of this interest, it follows that due process, at the very least, requires states to make a case-by-case determination of whether a free or partially-funded transcript is necessary to insure that indigent people have the opportunity to commence an appeal that otherwise is available by right to those who are wealthier.

Unfortunately, the Mississippi Supreme Court's long-standing precedent and practice precludes even *the possibility* of allowing an indigent to appeal without paying the costs of preparing the transcript and record. By applying that inflexible rule to the present case, that Court has made it clear that even in cases involving termination of fundamental rights, such as the fundamental rights of a parent, the Court will not permit the appeals of poor people who cannot afford to pay for the record and the transcript. Because the Mississippi Supreme Court will not consider this even on a case-by-case basis, its decision in the present case appears to conflict with the principles in *Lassiter*.

Moreover, as stated previously, it conflicts with the reasoning in *Griffin* and *Boddie*, and raises an important

federal constitutional issue that should be resolved by this Court.

II. THE DECISION OF THE SUPREME COURT OF MISSISSIPPI CONFLICTS WITH DECISIONS OF THE SUPREME COURTS OF OHIO, MICHIGAN, ARIZONA, VERMONT, AND FLORIDA, AND OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Contrary to the Supreme Court of Mississippi's decision in this case, the Supreme Courts of Ohio, Michigan, and Arizona all have held that the due process and equal protection clauses of the Fourteenth Amendment require that indigent parents be furnished a transcript, without the necessity of payment that otherwise would be necessary, in order to appeal adverse lower court decisions terminating parental rights. *State ex rel. Heller v. Miller*, 399 N.E.2d 66 (Ohio 1980); *Reist v. Bay County Circuit Judge*, 241 N.W.2d 55 (Mich. 1976); *In the Matter of Appeal in Pima County Juvenile Action No. J-46735*, 540 P.2d 642 (Ariz. 1975).

Beyond that, decisions of the Supreme Courts of Vermont and Florida have held that the due process and equal protection clauses of the Fourteenth Amendment require that indigent litigants be furnished a transcript so they can appeal adverse lower court decisions ordering that they be involuntarily committed to mental institutions. *In Re L.G.*, 603 A.2d 381 (Vermont 1992); *Shuman v. State*, 358 So.2d 1333 (Fla. 1978). While these two cases do not deal precisely with the issue of parental termination, their reasoning is at odds with that of the Mississippi Supreme Court, which has inflexibly refused to permit in

forma pauperis civil appeals regardless of the interest involved. Moreover, this Court's constitutional decisions indicate that parental termination rulings, like involuntary civil commitments, implicate fundamental constitutional interests that require protection under the due process clause. *See, Santosky v. Kramer*, 455 U.S. at 754-756, 764, 768 (holding that due process requires a clear and convincing standard of proof before terminating a person's parental rights, and citing *Addington v. Texas*, 455 U.S. 745, 754 (1979), which held that the same standard is required for involuntary civil commitments). Given the constitutional similarities between the two types of proceedings, the decisions of the Supreme Courts of Vermont and Florida conflict with that of the Supreme Court of Mississippi.

Also, the United States Court of Appeals for the Third Circuit has held that the due process clause of the Fourteenth Amendment mandates that indigent civil defendants in Delaware be allowed to take advantage of the option to appeal adverse justice of the peace judgments to Superior Court, where a trial de novo is available, without meeting the state's surety bond requirement, which otherwise forces civil defendants to post a bond equaling the amount of the judgment plus costs. *Lecates v. Justice of the Peace Court No. 4*, 637 F.2d 898 (3rd Cir. 1980). Although *Lecates* did not involve the fundamental matter of termination of parental rights, but only involved a civil debt stemming from foreclosure of an automobile, and although it dealt with a de novo appeal from a justice of the peace court to a trial court of record rather than an appeal from a trial to an appellate

court, its basic holding is that a state cannot erect financial barriers that prevent civil defendants from taking the same appellate avenues available to others. While the petitioners here do not seek such a broad ruling, instead focusing on the constitutional interest surrounding the specific nature of a termination of parental rights, it is nevertheless clear that the Third Circuit's decision directly conflicts with the decision of the Supreme Court of Mississippi in the present case.

In this connection, it is important to note that many other states have required the provision of transcripts for indigents in civil appeals of an important nature, but have done so on grounds of state statutes, rules, or constitutional provisions, rather than on federal constitutional grounds. *See, e.g., Grove v. State*, 897 P.2d 1252, 1259 (Wash. 1995).

With respect to the federal constitutional issue, the conflicts described in this section of the petition should be resolved by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Mississippi.

Respectfully Submitted,

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(510) 642-4474

Counsel for Petitioner
*Counsel of Record

IN THE SUPREME COURT OF MISSISSIPPI

ORDER

(Filed Aug. 31, 1995)

The Clerk's Dismissal of the following cases is hereby approved:

1. ERIC GRUBBS A/K/A "HEAVY" A/K/A "BIG BOY" A/K/A ERIC BERNARD GRUBBS
   v.
   STATE OF MISSISSIPPI
   Case Number: 92-KA-01226

2. M. L. B.
   v.
   S. L. J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S. L. J. AND M. L. J., AND HIS WIFE, J. P. J.
   Case Number: 95-TS-00052

3. ANTHONY WILLIAMS
   v.
   ROSE GIBSON
   Case Number: 95-TS-00453

4. BRANDEN C. LIGHTFOOT
   v.
   S. W. PUCKETT, ET AL.
   Case Number: 95-TS-00580

The costs in each case are assessed to the appellant.

SO ORDERED, this the 29th day of August, 1995.

/s/ Michael Sullivan
MICHAEL SULLIVAN,
JUSTICE
FOR THE COURT

[SEAL]

MANDATE
From The
SUPREME COURT OF MISSISSIPPI

To the Benton County Chancery Court – GREETINGS:

On 31st Day of August, 1995, in proceedings held in the Courtroom, Carroll Gartin Justice Building, the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case #95-TS-00052-

Trial Court Case #93A006

M. L. B.

vs.

S. L. J., Individually, and as Next Friend of the Minor Children, S. L. J. and M. L. J., and his wife, J. P. J.

Appeal dismissed according to M.R.A.P. 2. Costs are assessed to the appellant. Order entered.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

WITNESS, the Hon. Armis E. Hawkins, Chief Justice of the Supreme Court of Mississippi; also the signature of the clerk and the Seal of said Court hereunto affixed, in the City of Jackson, on September 21, 1995, A.D.

/s/ Linda Stone
Supreme Court Clerk

IN THE SUPREME COURT OF MISSISSIPPI
NO. 95-TS-00052

M.L.B. — Appellant

v.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J. — Appellees

ORDER

(Filed Aug. 18, 1995)

This matter came before the Court on the Motion to Suspend Rules, for Leave to Appeal In Forma Pauperis, and to Brief Issue of In Forma Pauperis Appeals. The appellant claims that he is unable to pay the costs of appeal and that the Court should suspend the rules and allow the appellant to proceed in forma pauperis. The motion asks permission to brief the issue of in forma pauperis appeals. The right to proceed in forma pauperis in civil cases exists only at the trial level. *Moreno v. State*, 637 So. 2d 200 (Miss. 1994). *See also Nelson v. Bank of Mississippi*, 498 So. 2d 365 (Miss. 1986); *Life and Casualty Ins. Co. v. Walters*, 190 Miss. 761, 772-74, 200 So. 732, 733-34 (1941). This Court finds that the motion should be denied.

IT IS THEREFORE ORDERED that the Motion to Suspend Rules, For Leave to Appeal In Forma Pauperis, and to Brief Issue of In Forma Pauperis be, and hereby is, denied.

SO ORDERED, this, the 15th day of August, 1995.

/s/ Michael Sullivan
FOR THE COURT

IN THE SUPREME COURT OF MISSISSIPPI

NO. 95-TS-00052

M.L.B. — **APPELLANT**

v.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J. — **APPELLEES**

ORDER

(Filed July 10, 1995)

The docket in this cause shows that the Appellant has substantially failed to prosecute this appeal as indicated below:

1. Appellant has failed to pay the appeal costs to lower court clerk.

2. Appellant has not filed the designation of record and/or filed the Certificate of Compliance with the lower court clerk.

The docket also shows that the Clerk did, by letter of June 23, 1995, give Appellant written notice of the default.

THEREFORE, IT IS ORDERED:

That the Clerk shall notify the Appellant of this deficiency by mailing to the appellant a copy of this Order. The Appellant shall have fourteen (14) days from the date of entry of this Order within which to correct the deficiency, failing in which this appeal shall stand dismissed, which shall be noted upon the record by the Clerk.

No extensions of time shall be granted beyond this period within which to cure any deficiency.

ORDERED, this the 10th day of July, 1995.

/s/ Michael Sullivan
FOR THE COURT

IN THE SUPREME COURT OF MISSISSIPPI

NO. 95-TS-00052

M.L.B. — Appellant

v.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J. — Appellees

ORDER

(Filed Jun. 5, 1995)

This matter came before the Court on the Motion for Leave to Withdraw from Representation and the Modified Motion for Leave to Withdraw from Representation. In the original motion, Danny Lampley and North Mississippi Rural Legal Services, counsel of record for the Appellant requested permission to withdraw as counsel for the Appellant. In the modified motion, Danny Lampley requests that he be allowed to continue representing the Appellant while allowing North Mississippi Rural Legal Services to withdraw. Lampley also requests thirty (30) days to allow the Appellant to get her finances in order or to obtain new counsel.

This Court finds that North Mississippi Rural Legal Services should be allowed to withdraw and that Danny Lampley should continue to represent the Appellant. Since the modified motion was filed on March 6, 1995, and the case has been suspended pending a ruling on the motion pursuant to M.R.A.P. 31(e), this Court finds that

the request for thirty (30) days to obtain financing or new counsel should be denied without prejudice.

IT IS THEREFORE ORDERED that North Mississippi Rural Legal Services be allowed to withdraw as counsel for the Appellant. Danny Lampley is to continue to represent the Appellant.

IT IS FURTHER ORDERED that the request for thirty (30) days to obtain financing or new counsel be, and hereby is, denied without prejudice.

SO ORDERED, this, the 30 day of May, 1995.

/s/ Michael Sullivan
FOR THE COURT

IN THE CHANCERY COURT OF
BENTON COUNTY, MISSISSIPPI

SAMMY LEE JAMES, INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, SAMUEL LEE JAMES AND MELISSA LEANN JAMES, AND HIS WIFE JANET (PANNELL) JAMES	PLAINTIFF
VS.	CAUSE NO. 93-A-006
MELISSA LUMPKIN BROOKS	DEFENDANT

DECREE OF ADOPTION

(Filed Dec. 14, 1994)

THIS DAY, a day of the regular December 1994 term of the Chancery Court of Benton County, Mississippi, there came on to be and was heard the above cause on Complaint for Adoption of Minor Children filed by Sammy Lee James, Individually, and as Next Friend of the Minor Children, Samuel Lee James and Melissa Leann James, and his Wife, Janet (Pannell) James; Response, Affirmative Defenses, and Counter-Complaint to Complaint for Adoption of Minor Children, and in the Alternative, for Other Relief filed by the Defendant, Melissa Lumpkin Brooks; and on proof in open Court.

And it appears to the satisfaction of the Court that it has jurisdiction over the parties and subject matter herein.

It further appears that the parties herein are all resident citizens of Benton County, Mississippi, and have

been such for more than ninety (90) days prior to the filing of the Complaint for Adoption.

It further appears that the minor children named in the Complaint to be adopted are Samuel Lee James, age nine (9) years and born April 10, 1985, and Melissa Leann James, age seven (7) and born February 13, 1987. Further, that the Plaintiff, Sammy Lee Lames, is the natural, biological father of the minor children, Samuel Lee James and Melissa Leann James, and Janet (Pannell) James is the wife of Sammy Lee James, having been married on the 4th day of September, 1992. Melissa Lumpkin Brooks is the natural biological mother of the minor children, Samuel Lee James and Melissa Leann James.

It further appears to the Court, based upon the proof, testimony, and evidence presented at the trial of this cause held on August 18, 1994, November 2, 1994, and December 12, 1994, that there has been a substantial erosion of the relationship between the natural mother, Melissa Lumpkin Brooks, and the minor children, Samuel Lee James and Melissa Leann James, which has been caused at least in part by Melissa Lumpkin Brooks' serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with her minor children, as specified by Section 93-15-103(3)(e) of the Mississippi Code of 1972, as Amended.

It further appears to the Court, having considered the stability of environment, ties between the prospective adopting parent and the children, moral fitness of the parents and the home, school and community record of the children, that it would be in the best interest of the

minor children, Samuel Lee James and Melissa Leann James, if the Complaint for Adoption of said minor children was granted.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, as follows:

(1) Pursuant to Section 93-17-7 and Section 93-15-103 of the Mississippi Code of 1972, as Supplemented, the parental rights of the Defendant, Melissa Lumpkin (James) Brooks, the natural, biological mother of the minor children, Samuel Lee James and Melissa Leann James, be and same are hereby forever terminated, due to the substantial erosion of the relationship between the natural mother, Melissa Lumpkin Brooks, and the minor children, Samuel Lee James and Melissa Leann James, which has been caused at least in part by Melissa Lumpkin Brooks' serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with her minor children.

(2) That the best interests of the minor children, Samuel Lee James and Melissa Leann James, would be promoted and enhanced by granting their adoption by Janet (Pannell) James, their stepmother and wife of their natural father, Sammy Lee James.

(3) That the Plaintiffs herein have met their burden of proof in this cause by clear and convincing evidence.

(4) That the Plaintiffs, Sammy Lee James and Janet (Pannell) James, were married on the 4th day of September, 1992, and that the Plaintiff, Janet (Pannell) James, has become very attached to the minor children, Samuel Lee James and Melissa Leann James, and has given them the

care, love and affection as if said children were her own natural children. That the said Janet (Pannell) James is a fit, proper and suitable person to adopt said children and share with the natural father the responsibility of their care, custody and control and it would be to the best interest, health and welfare of the said minor children if said adoption were approved.

(5) That the said minor children shall inherit from and through the adopting parent, Janet (Pannell) James, and shall likewise inherit from the other children of the said adopting parent to the same extent and under the same conditions as provided for the inheritance between brothers and sisters of the full blood by the laws of descent and distribution of the State of Mississippi, and the adopting parent and her other children shall inherit from the said minor children, just as if said children had been born to the said Janet (Pannell) James in lawful wedlock; the minor children and the adopting parent and the adoptive kindred are vested with all of the rights, powers, duties and obligations respectively, as if said children had been born to the adopting parent in lawful wedlock, including the rights existing by virtue of Section 11-7-13 of the Mississippi Code of 1972; provided, however, that the inheritance by and through the adopted child shall be governed as aforesaid.

(6) That the names of the adopted children shall remain on the Birth Certificates as Samuel Lee James and Melissa Leann James.

(7) That all parental rights of the natural mother, Melissa Lumpkin (James) Brooks, shall be terminated, and the natural mother and natural maternal kindred of the children shall not inherit by and through the child,

except this provision shall not apply to the natural father, Sammy Lee James, who retains all rights, privileges and obligations of natural parenthood and custody; however, nothing shall restrict the right of any person to dispose of property under a Last Will and Testament.

(8) The adopting parent, Janet (Pannell) James, shall be reflected as the mother of said minor children, Samuel Lee James and Melissa Leann James, on the Birth Certificates of said children.

(9) That a certified copy of the judgment of adoption be furnished to the Bureau of Vital Statistics of the State of Mississippi, together with the appropriate certificate of Clerk of this Court, as provided by Section 93-17-21 of the Mississippi Code of 1972, and other laws applicable and pertaining thereto.

(10) That these proceedings be kept in a confidential file as provided by law.

(11) That the Guardian Ad Litem in this cause, James W. Pannell, Attorney at Law, Ripley, Mississippi, be and same is hereby awarded a fee of Five Hundred Dollars ($500.00), same assessed as a portion of the court costs in this proceeding.

(12) Plaintiff shall be taxed with all court costs in this proceeding.

SO ORDERED, ADJUDGED AND DECREED, this the 12th day of December, 1994, entered nunc pro tunc this the 14th day of December, 1994.

/s/ Anthony T. Farese
CHANCELLOR

IN THE CHANCERY COURT OF
BENTON COUNTY, MISSISSIPPI

SAMMY LEE JAMES, individually,
and as next friend of the minor
children, S.L.J. and M.L.J.,
and his wife, JANET (PANNELL) JAMES — PLAINTIFF/COUNTER-DEFENDANTS

VS. — CAUSE NO. 93-A-006

MELISSA LUMPKIN BROOKS — DEFENDANT/COUNTER-PLAINTIFF

NOTICE OF APPEAL

(Filed Jan. 11, 1995)

BY THIS NOTICE, Defendant/Counter-Plaintiff Melissa Lumpkin Brooks appeals to the Supreme Court of Mississippi from the final Decree of Adoption, and termination of her parental rights, entered on December 12, 1994.

Respectfully Submitted,
MELISSA LUMPKIN BROOKS

BY: /s/ Danny Lampley
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ATTORNEY FOR
APPELLANT
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432 MAGAZINE,
SUITE 100
TUPELO, MS 38802-7245
(601) 840-4006
MS BAR #8717

OF COUNSEL:
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P.O. BOX 767
OXFORD, MS 38655
(601) 234-8731

[Certificate of Service Omitted in Printing]

IN THE CHANCERY COURT OF
BENTON COUNTY, MISSISSIPPI

SAMMY LEE JAMES, INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, SAMUEL LEE JAMES AND MELISSA LEANN JAMES, AND HIS WIFE, JANET (PANNELL) JAMES — PLAINTIFFS

VS. — CAUSE NO. 93-A-006

MELISSA LUMPKIN BROOKS — DEFENDANT

CLERK'S ESTIMATE OF COSTS

(Filed Jan. 20, 1995)

Court Reporter's estimate 950 pages @$2.00 per page	$1900.00
Chancery Clerk's estimate 219 pages @ $2.00 per page	$ 438.00
Binders	4.36
Mailing	10.00
TOTAL:	$2352.36

This the 20th day of January, 1995.

/s/ Mark M. Ormon
Chancery Court Clerk

SEAL

cc: Linda Stone, Clerk
MS Supreme Court
P. O. Box 249
Jackson, MS 39205

Danny Lampley
Attorney at Law
John Glenn Bldg., Suite 100
432 Magazine Street
P. O. Box 7245
Tupelo, MS 38802-7245

IN THE CHANCERY COURT OF
BENTON COUNTY, MISSISSIPPI

S.L.J., and his wife, J.(P.)J.,
individually and as next friends
of the minor children, S.L.J. and M.L.J. — PLAINTIFFS/COUNTER DEFENDANTS

VS. — CAUSE NO. 93-A-006

M.L.B. — DEFENDANT/COUNTER-PLAINTIFF

MOTION FOR LEAVE TO APPEAL
IN FORMA PAUPERIS

(Filed Jul. 24, 1995)

COMES NOW the appellant, M.L.B., by counsel, and moves the trial court for leave to appeal in forma pauperis, and would show:

1) Appellant is unable, despite having had an ample amount of time to do so, to pay the costs of her appeal in advance. In addition to the statements made in her Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis, attached hereto as Exhibit A, Appellant is entirely without credit which would permit her to borrow the necessary funds; has no family members with the financial ability to advance the costs; and her counsel, though he would be permitted by Rule 1.8(e)(2) of the Rules of Professional Conduct, simply does not have the funds available to advance on her behalf.

2) Counsel is well aware of prior Mississippi Supreme Court precedent to the effect that a civil litigant may not appeal in forma pauperis; namely, *Nelson v. Bank of Mississippi*, 498 So.2d 365 (Miss. 1986) and *Life & Cas.*

Insurance Co. v. Walters, 190 Miss. 761, 200 So. 732 (1941). However, where the State's judicial processes are invoked to secure so severe an alteration of a litigant's fundamental rights – the termination of the parental relationship with one's natural child – basic notions of fairness, justice, of equal protection under the law, and of substantive and procedural due process, protections guaranteed by this State's Constitution and the Constitution of the United States, require that a person be afforded the right of appellate review though one is unable to pay the costs of such review in advance.

WHEREFORE, PREMISES CONSIDERED, appellant requests that this court set a hearing at which she will be afforded an opportunity to argue in support of her motion to appeal in forma pauperis despite prior state Supreme Court rulings to the contrary.

THIS the 24th day of July, 1995.

Respectfully Submitted,
M.L.B., Appellant

/s/ Danny Lampley
DANNY LAMPLEY
ATTORNEY FOR
APPELLANT
P.O. BOX 7245
TUPELO, MS 38802
(601) 840-4006
MS BAR #8717

[Certificate of Service Omitted in Printing]

[Exhibits Omitted in Printing]

IN THE SUPREME COURT OF MISSISSIPPI

M.L.B. — APPELLANT

VS. — CASE NO 95-TS-0052

S.L.J., Individually, and as Next Friend of the minor children, S.L.J. and M.L.J., and his wife, J.P.J. — APPELLEES

MOTION TO SUSPEND RULES, FOR LEAVE TO APPEAL IN FORMA PAUPERIS, AND TO BRIEF ISSUE OF IN FORMA PAUPERIS APPEALS

COMES NOW the appellant, M.L.B., by counsel, and moves this Court to suspend the operation of the Mississippi Rules of Appellate Procedure, for good cause to be shown pursuant to M.R.A.P. 2(c), for leave to appeal in forma pauperis and for leave to brief the issue regarding whether a civil litigant in a parental rights termination proceeding should be allowed to appeal in forma pauperis, and would show:

1) In response to the Order of this Court entered July 10, 1995 counsel for appellant has filed a Designation of the Record (copy attached hereto as Exhibit 1), a Statement of the Issues (copy attached hereto as Exhibit 2), and a Motion for Leave to Appeal in Forma Pauperis (copy attached hereto as Exhibit 3), all filed in the trial court on July 24, 1995.

2) As stated in her Motion for Leave to Appeal in Forma Pauperis filed in the trial court appellant is unable to pay the costs of her appeal in advance; is unlikely to be able to pay the costs in the foreseeable future; and by reason of the inability to pay some $2300.00 is in all probability not going to be able to obtain appellate

review of the lower court's decision to terminate her parental rights.

3) The inability to obtain appellate review of a decision involving such an extreme measure as the termination of a parent's relationship with her natural children solely because the appellant cannot pay for the transcript and costs is fundamentally unfair, unjust, and violative of the Mississippi Constitution. See Article 3, Sections 11, 14, and 24.

4) Termination of the relationship between parent and child implicates a fundamental liberty interest protected both by the Fourteenth Amendment to the U.S. Constitution and Article 3, Section 14 of the Mississippi Constitution.

5) The denial because of the indigency of the appellant of the right of review in a case involving such a fiercely guarded fundamental interest – an interest "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children' " is "more precious than any property right," *Santosky v. Kramer*, 455 U.S. 745, 758-9, 71 L.Ed.2d 599, 610 (1982), citing *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 68 L.Ed.2d 640, 101 S.Ct. 2153 (1981) – appears to be a violation of the requirement of due process and a denial of equal protection under the law and raises a substantial question regarding whether this Court should continue to maintain its rule prohibiting civil in forma pauperis appeals either in all cases or in cases in which fundamental interests are at stake.

WHEREFORE, PREMISES CONSIDERED, appellant requests that this Court suspend the operation of the Mississippi Rules of Appellate Procedure pursuant to M.R.A.P. 2(c) and permit the lower court to hear and make a record concerning her Motion for Leave to Appeal in Forma Pauperis; and in the event of an adverse decision, permit the appellant to cause the record of the proceedings on the sole issue to be first separately sent up for review and a ruling by this Court before the appellant is required to pay the costs to have the entire designated record sent up; or, in the alternative, it is requested that this Court in the first instance consider the issue of an appeal in forma pauperis in parental rights termination cases, rather than have the matter first heard in the lower court, and if this Court should so elect, allow the appellant to fully brief the specific issue in this Court.

THIS the 27th day of July, 1995.

Respectfully Submitted,
M.L.B., Appellant

/s/ Danny Lampley
DANNY LAMPLEY
ATTORNEY FOR
APPELLANT
P.O. BOX 7245
TUPELO, MS. 38802
(601) 840-4006
MS BAR #8717

[Certificate of Service Omitted in Printing]

[Exhibits Omitted in Printing]

No. 95-853

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

M.L.B.,
Petitioner,
v.
S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent
State of Mississippi
* Counsel of Record

February 20, 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-853

M.L.B.,

Petitioner,

v.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent State of Mississippi respectfully requests that this Court deny petition for a writ of certiorari seeking review of the August 31, 1995 opinion of the Mississippi Supreme Court. That opinion is unreported but is reproduced in the appendix of the petition for writ of certiorari. The Mississippi Supreme Court denied petitioner's motion to appeal in forma pauperis holding that the right to proceed in forma pauperis in civil cases exists only at the trial level.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE RULING OF THE MISSISSIPPI SUPREME COURT IN THIS CASE IS IN CONFORMITY WITH THIS COURT'S RULING IN *ORTWEIN v. SCHWAB*, 410 U.S. 656 (1973) AND EVERY CIRCUIT COURT OF APPEALS WHICH HAS ADDRESSED THE SAME OR SIMILAR ISSUES.

The decision of the Mississippi Supreme Court in this case holds that the right to proceed in forma pauperis in civil cases exists only at the trial level.[1] This ruling is in conformity with this Court's decision in *Ortwein v. Schwab*, 410 U.S. 656 (1973).[2] In *Ortwein*, this Court held that Oregon's $25 appellate court filing fee (1) was not a denial of due process, because the petitioners received agency pre-termination evidentiary hearings meeting due process requirements; (2) did not violate the equal protection clause, as unconstitutionally discriminating against the poor, because the fee was rationally justified to meet court expenses; and (3) did not violate the equal protection clause as arbitrary and capricious in allowing others to appeal in forma pauperis. This Court specifically rejected appellants reliance, as petitioners herein, on *Boddie v. Connecticut*, 401 U.S. 371 (1971), noting that *Boddie* "was not concerned with post-hearing review." 410 U.S. at 659.

The Fifth Circuit Court of Appeals in *Nickens v. Melton*, 38 F.3d 183 (5th Cir. 1994) addressed and rejected the arguments raised by petitioner herein. The

[1] *See also Moreno v. State*, 637 So.2d 200 (Miss. 1994), *Nelson v. Bank of Mississippi*, 498 So.2d 365 (Miss. 1986), and *Life and Casualty Ins. Co. v. Walters*, 190 Miss. 761, 772-74, 200 So. 732, 733-34 (1941).

[2] *See also United States v. Kras*, 409 U.S. 434 (1973) (rejecting a challenge to a filing fee by an indigent debtor who sought access to bankruptcy court); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (holding that refusal to appoint counsel for indigent parent in parental status termination proceeding does not violate the due process clause of the Fourteenth Amendment).

Court, relying on this Court's decision in *Ortwein* held that Miss. Code Ann. § 11-53-17 (1993) allows a petitioner to proceed in forma pauperis at the trial court level and therefore provides adequate post-deprivation remedies to satisfy due process. *Id.* at 185; *see also Lindsey v. Normet*, 405 U.S. 56 (1972) (holding that a State does not have to provide appellant review if a full and fair hearing on the merits has been provided)[3]; *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937) (holding that "Due process does not comprehend the right of appeal."); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930) (stating that "the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance").

The Fifth Circuit also held that since in forma pauperis litigants are not a suspect class, the standard for equal protection purposes is whether the requirement is "rationally related to a legitimate government interest." *See Wayne v. Tennessee Valley Authority*, 730 F.2d 392, 404 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985). The Court held that requiring civil litigants to prepay appellate cost is rationally justified because it helps offset the cost of operating the appellate court system. *Nickens*, 38 F.3d at 185.

The *Griffin v. Illinois*, 351 U.S. 12 (1956) line of cases cited by petitioner are not relevant since they deal only with criminal cases.[4] Likewise, the statement by the Court in *Lassiter v. Department of Social Services*, 452 U.S. 18

[3] The Court did, however, hold that a double bond requirement for FED appellants only is arbitrary and irrational and therefore violates equal protection. *Id.* at 79.

[4] Whether or not the accused is subject to confinement is not relevant. *See Mayor v. Chicago*, 404 U.S. 189, 197 (1971) (acknowledging that the practical effect of conviction of even a petty offense could be as detrimental to the accused as forced confinement).

(1981), that appointed counsel may be required in a termination of parental rights case if there are allegations upon which criminal charges could be based is not applicable to this case. Petitioner was represented by counsel in the trial court and she has not alleged that any allegations were made upon which criminal charges could be based.

The other Circuit Courts which have addressed the issue of prepayment of appeal cost have reached the same conclusion as Mississippi and the Fifth Circuit Court of Appeals. *See, e.g., Edward B. v. Paul,* 814 F.2d 52 (1st Cir. 1987); *Hill v. State of Michigan,* 488 F.2d 609 (6th Cir. 1973), *cert. denied,* 416 U.S. 973 (1974); *Piatt v. MacDougall,* 773 F.2d 1032 (9th Cir. 1985); *Otasco, Inc. v. United States,* 689 F.2d 162 (10th Cir. 1982), *cert. denied,* 460 U.S. 1069 (1983).

A. The Decision of the Mississippi Supreme Court Is Not in Conflict With the Third Circuit Court of Appeals.

The decision by the Court of Appeals for the Third Circuit in *Lecates v. Justice of the Peace Court No. 4,* 637 F.2d 898 (3d Cir. 1980), cited by petitioner herein as being in conflict with the decision by the Mississippi Supreme Court, does not address appeal from a hearing meeting minimum due process requirements and therefore does not conflict with the decision of the Mississippi Supreme Court. *Lecates* challenged the requirement of posting a surety bond in order to obtain a trial de novo in Superior Court after a judgment was rendered against him in a justice of the peace court. The Court noted that justice of the peace courts in Delaware are not courts of record, do not issue opinions, are presided over by persons who are not trained in the law, and do not have provision for jury trials. The Third Circuit held that the requirement of posting bond under those circumstances violated plaintiff's due process and equal protection rights.

This conclusion was based on the holding in *Boddie v. Connecticut,* 401 U.S. 371 (1971) that due process requires that persons be given a "meaningful opportunity to be heard." 401 U.S. at 377. *Lecates* held that the Delaware Constitution defines "meaningful opportunity to be heard" to include the right of trial by jury and a judge who is knowledgeable about the law. 637 F.2d at 309-10.

B. The Majority of State Courts Which Have Addressed Appeal Costs Assessed to Indigents Agree With the Mississippi Supreme Court.

It appears that the vast majority of state courts which have addressed constitutional challenges to the assessment of appellate fees to indigents have concluded that such do not violate due process or equal protection. *See, e.g., In Re Marriage of Valleroy,* 548 S.W.2d 857 (Mo. 1977) (holding that assessment of appellate fees and cost to an indigent does not violate due process where a meaningful opportunity to be heard incident to dissolution of marriage has been provided at the trial court level); and *Rich v. Lang,* 604 P.2d 1248 (Okla. 1979) (holding that due process does not require the state to furnish a transcript to an indigent on an appeal of a termination of parental rights).

Other states have established public policy through state statutes, rules, or constitutional provisions requiring the provision of transcripts for indigents in certain civil appeals, rather than on federal constitutional grounds.[5]

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[5] Those decisions which have required that transcripts be provided to indigents based on federal constitutional grounds are aberrations based on the predilection of the individual justices rather than well reasoned opinions. *See, e.g.,* the opinion of the Court in *In the Matter of Appeal in Pima County Juvenile Action No. J-46735,* 540 P.2d 642 (Ariz. 1975) which does not even mention the *Ortwein* decision.

II. PETITIONER WAS ACCORDED ALL RIGHTS IN THE LOWER COURT TO WHICH SHE WAS ENTITLED CONSISTENT WITH WELL-ESTABLISHED PRECEDENT.

Petitioner, in her termination of parental rights hearing in the Chancery Court of Benton County, Mississippi, was represented by counsel and was accorded a full hearing on the merits in front of a judge trained in the law. This process more than met the requirements of both *Boddie v. Connecticut*, 401 U.S. 371 (1971) (requiring waiver of filing fees when a fundamental right is involved and no other means to obtain a "meaningful opportunity to be heard" is available) and *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (holding that refusal to appoint counsel for indigent parent in parental status termination proceeding does not violate the due process clause of the Fourteenth Amendment). This process was also sufficient to meet the requirements of the Third Circuit Court of Appeals in *Lecates v. Justice of the Peace Court No. 4*, 637 F.2d 898 (3d Cir. 1980).

Petitioner in this case was accorded all due process and equal protection to which she was entitled under well-established precedence of this Court and of all Circuit Courts of Appeal which have addressed the same or similar issues.

A. Petitioner Is Unlikely To Prevail on an Appeal.

The Chancellor, after hearing all of the evidence, found that there was clear and convincing proof to justify termination of the parental rights of petitioner in this case. Miss. Code Ann. § 93-15-109. Petitioner alleges that the primary error that she intends to urge on appeal is that the Chancery Court's decision was unsupported by, and contrary to, the evidence presented. It is highly unlikely that she would be successful since such assignments of error are reviewed under the manifest error/substantial credible evidence test.[6] *See Vance v. Lincoln County DPW*, 582 So.2d 414, 417 (Miss. 1991).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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February 20, 1996

[6] Respondents are aware of only two or three reported cases wherein the Mississippi Supreme Court has reversed a Chancellor's order terminating parental rights based on clear and convincing proof.

(3)

No. 95-853

In The

Supreme Court of the United States

October Term, 1995

M.L.B.,

Petitioner,

vs.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Nowhere does the Respondent's brief address the Petitioner's claim that certiorari should be granted because this case implicates *a fundamental right* -- specifically, the right of a parent in her relationship with her child. Instead, the Respondent bases its contention that certiorari should be refused upon case law which, for the most part, deals with the denial of in forma pauperis appeals in situations where no fundamental rights are at stake.

This reply memorandum first will address the importance of the federal constitutional issue involved in this case, and second will discuss the conflict among the courts.

THE IMPORTANCE OF THE FEDERAL CONSTITUTIONAL ISSUE

As noted in the Petition, the issue raised in this case is an important one that has yet to be decided by this Court, and the decision of the Mississippi Supreme Court conflicts with the reasoning of this Court's holdings in *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Boddie v. Connecticut*, 401 U.S. 371 (1971). The Respondent claims, however, that the Mississippi Supreme Court's decision "is in conformity with this Court's decision in *Ortwein v. Schwab*, 410 U.S. 656 (1973)," Respondent's Brief at 2, and that *Ortwein* specifically stated that *Boddie* "was not concerned with post-hearing review." *Id.*, quoting 410 U.S. at 659. While it is true that *Boddie* involved a trial court proceeding and *Ortwein* an appeal, this Court specifically based its decision in *Ortwein* on the fact that the interest in that case -- seeking increased welfare payments -- had what this Court called "far less constitutional significance than the interest of the *Boddie* appellants." *Ortwein*, 410 U.S. at 659. *Boddie* dealt with the dissolution of a marriage, which is of a similar magnitude, in terms of constitutional significance, as the dissolution of parental rights

that occurred in the present case. This distinguishes both *Boddie* and the present case from *Ortwein*. Moreover, the fee required in *Ortwein* was only twenty-five dollars, while the Mississippi Supreme Court in the present case required the advance payment of over two thousand dollars. None of these crucial points are addressed by the Respondent.

As for *Griffin*, the Respondent contends that *Griffin* and its progeny "are not relevant since they deal only with criminal cases." Resp. Br. at 3. This fails to recognize that this Court specifically has discussed *Griffin* in the context of civil cases, stating in *Boddie* that "the rationale of *Griffin* covers this case." 401 U.S. at 382. *See also, Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (citing *Griffin* in the course of striking down a procedural requirement that unconstitutionally burdened the availablity of appeals for some civil litigants). Indeed, the present case falls within the intersection of the principles in *Griffin*, which involved an appeal in a criminal case, and those in *Boddie*, which involved a trial court proceeding relating to a fundamental right in a civil case, and that is one of the reasons this Court should grant certiorari to review this case.

Also, with respect to *Griffin* and its progeny, nowhere does the Respondent address the very important point that, for many parents, the termination of parental rights by a state court is a much more grievous harm that what could be imposed by a state court in a misdemeanor criminal case, *see*, *Mayer v. Chicago*, 404 U.S. 189 (1971) (indigent defendant has a right to provision of a transcript for appeal in a case where he was faced with a $500 fine, and no imprisonment, for two misdemeanor offenses), or even in a felony case.

In this connection, the Respondent states that there were no allegations in the present case upon which criminal charges could be lodged against the Petitioner. Accordingly,

says the Respondent:

> [T]he statement by the Court in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1991), that appointed counsel may be required in a termination of parental rights case if there are allegations upon which criminal charges could be based is not applicable to this case.

Resp. Br. at 4. Of course, *Lassiter* held that a number of factors should be considered in determining whether appointment of counsel is constitutionally required in any given parental termination case, and only one of them -- mentioned in passing by the Court -- is whether the case included allegations of criminal activity. 452 U.S. at 27 n.3, 31. But even in *Lassiter*, in which the parental termination proceeding also involved no allegations of criminal conduct toward the child, *id.* at 32, the Court held that the Constitution requires at least an individual evaluation of whether the appointment of counsel was required *in that particular case*. The Mississippi Supreme Court's practice, refusing across-the-board to permit in forma pauperis civil appeals, does not allow even that much, although this Court's decisions establish that the right of access to existing appellate avenues is much broader than the right to counsel. *See*, Petition for Certiorari at 16, and the cases cited therein.

The Respondent attempts to denigrate the importance of the present case by contending that even if the Petitioner were constitutionally entitled to appeal despite her indigency, it is unlikely she would prevail on any such appeal to the Mississippi Supreme Court. Resp. Br. at 6-7 and n. 6. Of course, that is beside the point. The question here is whether the Petitioner has the constitutional right to appeal the termination of her parental rights just as a wealthier person can, even though the Petitioner cannot pay over $2,000 in advance of the appeal.

Moreover, to the extent the Petitioner's prospects in appealing the termination are relevant, it is clear the Petitioner has a serious possibility of prevailing. As noted in the Petition, appellate review in Mississippi, for those who can afford it, is an integral part of assuring that no parent's rights are terminated without meeting the federal constitutional and state statutory requirement of clear and convincing evidence of unfitness. Pet. Cert. at 13-14. Contrary to the implication of the Respondent, Resp. Br. at 6-7 and n. 6, the Mississippi Supreme Court has said it will not hesitate to reverse a termination of parental rights if the evidentiary standard has not been met. Pet. Cert. at 13-14.

Indeed, from 1980 to the present, there are sixteen reported Mississippi Supreme Court cases citing the termination statute, Miss. Code § 93-15-103. (Only about a year ago did Mississippi begin utilizing an intermediate Court of Appeals, but appeals still lie to the Supreme Court, which determines whether to keep the cases or send them to the Court of Appeals. See Rules 16-17, Miss. Rules of App. Procedure.) Twelve of those sixteen cases involved Supreme Court affirmance or reversal, on the merits, of the grant or denial of termination. Eight of those twelve reviewed trial court termination orders and the other four reviewed trial court denials of termination. Of the eight termination orders reviewed by the Court, three were reversed for a failure to meet the evidentiary standard, *Petit v. Holifield*, 443 So.2d 874 (Miss. 1984); *De La Oliva v. Lowndes County Dept. of Public Welfare*, 423 So.2d 1328 (Miss. 1982); *In Re Adoption of a Female Child*, 412 So.2d 1175 (Miss. 1982), while five were affirmed. *Natural Mother v. Paternal Aunt*, 583 So.2d 614 (Miss. 1991); *Vance v. Lincoln County Dept. of Public Welfare*, 582 So.2d 414 (Miss. 1991); *Carson v. Natchez Children's Home*, 580 So.2d 1248 (Miss. 1991); *G.M.R., Sr. v. H.E.S.*, 489 So.2d 498 (Miss. 1986); *Doe v. Attorney W.*, 410 So.2d 1312 (Miss. 1982).

Thus, any suggestion that appellate review is unimportant or unavailing in these cases is simply wrong. Given the availability of appellate review to parents who are not indigent and the fundamental nature of the interest at stake, the present case raises a very important issue of constitutional law.

THE CONFLICT AMONG THE COURTS

The Respondent does not dispute the fact that the decisions of at least five state supreme courts are at odds with the holding of the Mississippi Supreme Court in the present case, see Pet. Cert. at 20-21. Instead, the Respondent contends that these other decisions "are aberrations based on the predeliction of the individual justices rather than well reasoned opinions." Resp. Br. at 5, n. 5. That is a rather reckless and unsupportable statement. But more importantly, whether those other cases are the result of individual "predelictions" or serious constitutional analysis, they create a conflict that is appropriate for this Court's review and resolution on certiorari. See Rule 10(b) of the Rules of this Court.

Moreover, the Respondent is simply wrong to suggest that those five decisions are "aberrations," Resp. Br. at 5, n. 5, and that "the vast majority of state courts," id. at 5, agree with the Mississippi Supreme Court. The Respondent cites only two cases to support its claim about "the vast majority of state courts." In one of those two cases, *In Re Marriage of Valleroy*, 548 S.W.2d 857 (Mo. 1977), the appellant had obtained the relief she sought in the trial court in the sense that her marriage was dissolved, although she was not satisfied with all of the terms. While the Court held that due process did not require a waiver of the appellate fees and costs for her to appeal the details of the terms of the dissolution, this came in a context where she nevertheless

could afford to appeal inasmuch as she did appeal, and inasmuch as the appellate court reviewed her claim on the merits. In the other case, *Rich v. Lang*, 604 P.2d 1248 (Okla. 1979), the indigent parent was permitted to appeal, in forma pauperis and on the merits, the denial of his termination of parental rights without paying the cost deposit, even though the Court held that a transcript was unnecessary and that he was not entitled to a transcript in the context of that case. That is a far cry from the present case, where the Mississippi Supreme Court will not even consider the possibility of an in forma pauperis appeal and will not consider waiving the cost deposit -- irrespective of any questions about the necessity of a transcript.

As for the federal courts of appeals cases cited by the Respondent, Resp. Br. at 2, 4, none of them involved fundamental rights of the type at issue here. *See, e.g.*, *Nickens v. Melton*, 38 F.3d 183, 185 n. 5 (5th Cir. 1994) ("we note that the interest here at stake . . . is not as fundamental as, for example, marriage or liberty"). With respect to *Lecates v. Justice of the Peace Court No. 4*, 637 F.2d 898 (3rd Cir. 1980), the Respondent is correct that it hinged in part on the right to obtain a jury trial with a law-trained judge as part of the appeal de novo from a Justice of the Peace court to a court of record. Resp. Br. at 4-5. In that sense, it is different from the present case. But *Lecates* is relevant, and in conflict with the present case, inasmuch as it suggests that if a state creates court procedures that are available to litigants dissatisfied with the initial court proceeding in a civil case, access to the subsequent proceedings may not hinge on a litigant's wealth without violating the federal constitution. 637 F.2d at 909.

CONCLUSION

For the foregoing reasons, as well as those set out in the Petition, the writ of certiorari should be granted.

Respectfully Submitted,

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No. 95-853

IN THE

Supreme Court of the United States

October Term, 1995

M.L.B.,

Petitioner,

v.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J.,

Respondents.

On Writ of Certiorari To The Supreme Court of Mississippi

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In a State that provides appeals as a matter of right from adverse lower court decisions terminating parental rights, may the State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition those appeals upon a parent's ability to pay appeal fees in excess of two thousand dollars?

PARTIES

Initials were used to denote the parties in the Supreme Court of Mississippi, and are being used in this Court as well. The parties' full names are contained in the pleadings of the Chancery Court of Benton County, Mississippi. See Pet. App. 8.

Defendant/Counter-Plaintiff/Appellant: M.L.B.

Plaintiffs/Counter-Defendants/Appellees: S.L.J., individually and as next friend of his minor children, S.L.J. and M.L.J., and his wife, J.P.J.

The Defendant/Counter-Plaintiff/Appellant is the Petitioner here. Because this case involves a challenge to an existing practice of the Supreme Court of Mississippi, the Attorney General of Mississippi is appearing as a respondent in defense of the practice.

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BRIEF FOR PETITIONER

The petitioner, M.L.B., whose parental rights to her children were terminated by the Chancery Court of Benton County, Mississippi, seeks reversal of the decision of the Supreme Court of Mississippi, which refused to permit her appeal from the adverse termination decision because of her financial inability to pay to the Court appeal fees, including record preparation fees, in excess of two thousand dollars. This was done pursuant to the Mississippi Supreme Court's stated practice of automatically prohibiting in forma pauperis appeals in civil cases. See, *Moreno v. State*, 637 So. 2d 200 (Miss. 1994) (in forma pauperis appeals are not permitted in civil cases); *Nelson v. Bank of Mississippi*, 498 So.2d 365 (Miss. 1986) (same); *Life & Cas. Ins. Co. v. Walters*, 200 So. 732 (Miss. 1941) (same).

OPINIONS BELOW

The August 31, 1995 order of the Supreme Court of Mississippi dismissing the petitioner's appeal is unreported and is reproduced in the appendix to the petition for writ of certiorari, p. 1. The related August 18, 1995, July 10, 1995, and June 5, 1995 orders of the Supreme Court of Mississippi are unreported and are reproduced in Pet. App. 3, 4, and 6, respectively. The December 14, 1994 order of the Chancery Court of Benton County terminating the parental rights of petitioner is unreported and is reproduced at Pet. App. 8.[1]

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[1] This Court, on May 13, 1996, granted petitioner's motion to dispense with the filing of the joint appendix. The motion was based on the ground that all relevant materials are contained in the appendix to the petition for writ of certiorari.

JURISDICTION

The judgment of the Supreme Court of Mississippi dismissing the petitioner's appeal was issued on August 31, 1995. Pet. App. 1. The mandate of the Supreme Court of Mississippi, which is dated September 21, 1995, confirms that the date of the dismissal was August 31, 1995. Pet. App. 2. The petition for writ of certiorari was timely filed on November 29, 1995, and the writ was granted on April 1, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which reads in relevant part as follows:

> . . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

After being married for nearly eight years, petitioner M.L.B. and respondent S.L.J. were divorced on June 9, 1992, with their two children remaining in the custody of S.L.J., their father. Less than three months later, on September 4, 1992, S.L.J. remarried, this time to respondent J.P.J. Just over one year later, on November 15, 1993, respondents S.L.J. and J.P.J. filed this case in the Chancery Court of Benton County, Mississippi, seeking to terminate the parental rights of petitioner M.L.B., who is the natural mother of the

children, and to have J.P.J. take her place by adopting the children. The complaint did not allege any sort of abuse by M.L.B. toward the children or any type of criminal conduct on her part, but instead contended that she had not maintained reasonable visitation and was in arrears on child support payments. M.L.B. responded with a counterclaim seeking primary custody of the children and contending that S.L.J. had not permitted her reasonable visitation with her children, despite his agreement to do so as part of the initial divorce decree.

Under Mississippi law, a person's parental rights cannot be terminated absent clear and convincing evidence that the parent either abandoned or abused the child or is so unfit as to warrant termination. Miss. Code Ann., §§ 93-15-103, 93-15-109. Despite this high burden of proof, the Chancery Judge, after three days of trial, issued an order effective December 12, 1994, entered nunc pro tunc on December 14, 1994, terminating the parental rights of petitioner M.L.B. and in her stead allowing J.P.J. to adopt the children. Pet. App. 8. In the order, the Chancellor cited no specific grounds for the termination and, despite a vigorously contested trial, cited no specific evidence relating to or supporting his decision. Instead, he simply issued a conclusory statement repeating word for word the statutory language of Miss. Code § 93-15-103(3)(e). Pet. App. 9-10. At the time of the termination, M.L.B.'s children were nine and seven years old. *Id.* at 9.

In Mississippi, an appeal of right can be taken from all lower court final judgments in parental termination cases, as well as in other civil cases. Miss. Code § 11-51-3. The appeal is to be filed initially with the State Supreme Court, which determines after briefing whether to retain the case for decision or send it to the intermediate Mississippi Court of Appeals. Rules 16, 17, Mississippi Rules of Appellate Procedure.

Petitioner M.L.B. filed a timely notice of appeal to the Mississippi Supreme Court on January 11, 1995. Pet. App. 13. The Clerk of the Chancery Court then estimated the cost of preparing and transmitting the record to be $2,352.36, which included $1,900.00 for the transcript (950 pages at $2.00 per page), $438.00 for the other papers in the record (219 pages at $2.00 per page), $4.36 for binders, and $10.00 for mailing. Pet. App. 15. Although the petitioner had paid the $100 filing fee for the appeal, she could not afford to pay these remaining fees.

Under Mississippi law, the advance payment of these charges is a prerequisite to proceeding with an appeal. Rule 11(b)(1), M.R.A.P., requires the petitioner to pay in advance for the transcript as well as other necessary portions of the record. The per page costs of the transcript and the papers from the record are set by statute. Miss. Code §§ 25-7-1, 25-7-13(6). Rule 10(b)(2), M.R.A.P., requires a transcript to be prepared if the appellant "intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence." In this case, the primary error that the petitioner intended to urge on appeal was that the Chancery Court's decision terminating her parental rights was unsupported by, and contrary to, the evidence presented.[2]

---

[2] Rule 10(c), M.R.A.P., provides a procedure for preparing the record "[i]f no stenographic report or transcript . . . is available," but this procedure applies only if the court reporter's notes are lost or stolen or if the court reporter failed to transcribe an important portion of any trial or hearing. Luther T. Munford, Mississippi Appellate Practice, § 7.6 (1995). Rule 10(d), M.R.A.P., permits parties to an appeal to forego the transcript if they can agree on a written "statement of the case . . . setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented," but that was simply not an option in the present case, which involved a protracted and hotly contested evidentiary battle.

On July 10, 1995, the Mississippi Supreme Court issued an order requiring the petitioner, within fourteen days, to comply with certain prerequisites before the appeal could proceed. Pet. App. 4. The petitioner met all of these requirements except that of paying the $2,352.36 in appeal costs. Instead, on July 24, 1995 -- fourteen days after the Court's July 10 order -- she filed in the Chancery Court of Benton County a motion for leave to appeal in forma pauperis. Pet. App. 17. Attached to that motion was an affidavit of indigency showing that her limited financial means rendered her unable to pay the appeal costs. On July 27, 1995, she filed in the Supreme Court of Mississippi a motion to suspend rules, for leave to appeal in forma pauperis, and to brief the issue of in forma pauperis appeals. Pet. App. 19.

These two motions raised the federal constitutional issues that are now being presented to this Court. The July 24 Chancery Court motion, which was attached to and incorporated in the July 27 Mississippi Supreme Court motion, noted the Mississippi Supreme Court precedent stating that in forma pauperis appeals are prohibited in civil cases. Pet. App. 17-18, *citing, Nelson v. Bank of Mississippi*, 498 So.2d 365 (Miss. 1986); *Life & Cas. Ins. Co. v. Walters*, 200 So. 732 (Miss. 1941). However, the motion contended that the failure to permit the appeal because of the inability to pay the appeal costs, coming in a case involving the termination of the fundamental rights of a parent, would violate both the State and Federal Constitutions. More specifically, the motion stated:

> [W]here the State's judicial processes are invoked to secure so severe an alteration of a litigant's fundamental rights -- the termination of the parental relationship with one's natural child -- basic notions of fairness, justice, of

> equal protection under the law, and of substantive and procedural due process, protections guaranteed by this State's Constitution and the Constitution of the United States, require that a person be afforded the right of appellate review though one is unable to pay the costs of such review in advance.

Pet. App. 18.

The July 27 Supreme Court motion incorporated the July 24 Chancery Court motion, and added that the termination of parental rights "implicates a fundamental interest protected both by the Fourteenth Amendment to the U.S. Constitution and Article 3, Section 14 of the Mississippi Constitution." Pet. App. 20. It further stated:

> The denial because of the indigency of the appellant of the right to review in a case involving such a . . . fundamental interest . . . appears to be a violation of the requirement of due process and a denial of equal protection under the law. . . .

Id., citing, Santosky v. Kramer, 455 U.S. 745, 758-759 (1982), and *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). Accordingly, the federal issues were properly raised by these two motions in the Mississippi courts, one of which was filed in the Chancery Court and both of which were filed in the Mississippi Supreme Court. *See, Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 159 n.5 (1980).

On August 18, 1995, the Supreme Court of Mississippi issued an order denying the motion to suspend rules, for leave to appeal in forma pauperis, and to brief the issue of in forma pauperis appeals. The Court's sole basis for denying the motion was the following:

> The appellant claims he [sic] is unable to pay the costs of appeal and that the Court should suspend the rules and allow the appellant to proceed in forma pauperis. The motion asks permission to brief the issue of in forma pauperis appeals. The right to proceed in forma pauperis in civil cases exists only at the trial level. *Moreno v. State*, 637 So. 2d 200 (Miss. 1994). *See also Nelson v. Bank of Mississippi*, 498 So.2d 365 (Miss. 1986); *Life and Casualty Ins. Co. v. Walters*, 190 Miss. 761, 772-74, 200 So. 732, 733-34 (1941). The Court finds that the motion should be denied.

Pet. App. 3. On August 31, 1995, the Supreme Court of Mississippi ordered the appeal finally dismissed. Pet. App. 1-2. The petitioner then filed her petition for writ of certiorari and on April 1, 1996, this Court granted the writ.[3]

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[3] Throughout this litigation, the petitioner has been represented by pro bono counsel. Danny Lampley originally began representing the petitioner when he was a staff attorney for North Mississippi Rural Legal Services (NMRLS). Because of the petitioner's poverty, she was eligible for representation by that organization. After Mr. Lampley left NMRLS for private practice during the course of the Chancery Court proceedings, he retained the case pro bono because NMRLS did not have a sufficient number of attorneys for someone else to take over the case. Although Mr. Lampley later asked NMRLS to pay the appeal costs, and although Rule 1.8(e)(2) of the Mississippi Rules of Professional Conduct permitted NMRLS to do so, it did not because of constraints on its own budget. This is denoted in the record, in Exhibit B to the modified motion for leave to withdraw from representation, which was filed in the Mississippi Supreme Court so that NMRLS could withdraw after having determined that it was not in a position to carry the appeal financially. The Mississippi Supreme Court permitted NMRLS to withdraw from the case. Pet. App. 6. Because of the importance of the constitutional issue in this case, the American Civil Liberties Union Foundation and the American Civil Liberties Union of Mississippi are paying for the out-of-pocket expenses incurred in presenting the case to this Court.

SUMMARY OF ARGUMENT

One of the most fundamental rights that can be adjudicated in a court of law is the right inherent in a parent's relationship with his or her child. With a level of care that is appropriate given the stakes involved, Mississippi law provides not for an unreviewable decision by a single judge in parental termination cases, but for a two-tiered process of judicial decisionmaking. The initial decision is made by a single Chancery Court Judge, elected by the voters and sitting without a jury, but there is a right of appeal for those parents who are aggrieved by that decision and who wish it reviewed by an appellate court. Just as Mississippi could not, consistent with the Fourteenth Amendment, limit that appeal to those whose financial income exceeds some specific amount, it cannot limit it to those who can pay over $2000 in advance, while denying it to those who cannot. Unfortunately, the Mississippi Supreme Court has done that in this case. Whatever the constitutional propriety of that sort of practice in other types of civil cases, its imposition in this case -- involving the termination of the fundamental rights encompassed by the relationship between a parent and her child -- is clearly unconstitutional.

A significant line of precedent from this Court has applied the Fourteenth Amendment to protect the rights of citizens, no matter their financial condition, to pursue fundamental legal interests through existing avenues in state judicial systems. This initially was developed in the context of criminal appeals, beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956), which held that a citizen could not be precluded from an appeal available to others simply because he or she could not afford to pay for a transcript of the trial. This line of precedent has since included not only felony cases such as *Griffin*, but also misdemeanor appeals such as that in *Mayer v. City of Chicago*, 404 U.S. 193 (1971), which

held that a transcript must be provided for an indigent defendant appealing a conviction punished by a $500 fine with no jail time. The rationale of these precedents also has been applied by this Court in a civil case, *Boddie v. Connecticut*, 401 U.S. 371 (1971), where fundamental rights were at issue, and has played a part in this Court's resolution of a civil appeal involving the interests of impoverished appellants. *Lindsey v. Normet*, 405 U.S. 56 (1972). In a separate line of precedent, this Court has held that fundamental rights are implicated when a parent's relationship with his or her children is threatened through a state court parental termination proceeding. *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

The existing avenues in Mississippi's judicial system include the right of appeal in parental termination cases, but a transcript is required if a parent wishes -- as does the petitioner -- to challenge the termination on evidentiary grounds. If the petitioner could afford the appeal, including the transcript, it certainly would be a meaningful appeal. The Mississippi Supreme Court carefully reviews the findings in termination cases and has reversed a fairly high percentage of the termination decisions it has reviewed in reported cases. The present case is a perfect example of the importance of this sort of review in Mississippi. The complaint did not allege any sort of abuse or criminal conduct by the petitioner and the evidence was subject to serious dispute. Yet the Chancery Judge's written opinion did not discuss or cite any of the evidence and did not give any reasons, other than reciting the statutory language, for the termination. Just as the appeal of right in Mississippi represents the best and last hope for wealthier parents whose parental rights have been terminated, the appeal would be the best and last hope for people like the petitioner, if only they had access to it.

Given the fundamental nature of parental rights, and given that Mississippi law authorizes an appeal from decisions of a Chancery Court judge in termination cases, it violates both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment to open this appeal only to those who have sufficient wealth to pay the amounts that were charged here, while closing it to those who do not. By requiring over $2000 in advance for the appeal in this case and by refusing to consider the petitioner's contention that she cannot pay it, the Mississippi Supreme Court has acted in disregard of these principles.

While the interest of a parent in the relationship with his or her child is one of the most important that can be adjudicated in a court of law -- certainly more important than the interest involved in the misdemeanor cases in which this Court has required that poor people be granted access to existing appeals and given trial transcripts where necessary -- the State's pecuniary interest in saving money by not permitting these appeals is negligible. The number of parental termination appeals in Mississippi is rather small, particularly when compared to the large number of in forma pauperis felony and misdemeanor appeals in the State. There will be little financial burden on the State if those who cannot now afford it are allowed to appeal parental terminations along with those who can. Moreover, a ruling in the petitioner's favor by this Court will not open the floodgates to demands on state treasuries from impecunious appellants in other types of civil cases. There are few interests arising in civil litigation more important than the interest implicated in parental termination cases, and the petitioner can prevail here based on the importance of that interest without the need for any broad holding that in forma pauperis appeals are constitutionally required in all civil cases.

Thus, the Mississippi Supreme Court's decision is not

supported by an interest sufficient to justify the refusal to consider in forma pauperis appeals in parental termination cases such as this one.

ARGUMENT

In the realm of human relationships, among the most important is that between a parent and a child. The bonds between parents and children are at the center of our individual lives and our life as a culture.

However, as part of the protection of children from egregiously harmful situatations, the State has the power to terminate, through the operation of the law, the relationship between a parent and a child against the parent's wishes. This termination of parental rights is something that goes far beyond the legal determination of the proper physical custody of a child, which can occur if there is the breakdown of a family or the dissolution of a marriage. For even when custody exists in one parent or the other after a divorce, the remaining parent can still play a role in the child's life, can still see the child, and can still be with the child for significant periods of time, even if they are not living together on a constant basis. But when a State, operating through its court system and its judges, terminates parental rights, it completely dissolves the relationship between a parent and a child.

This is true not only as a legal matter, but also as a practical matter. A termination of parental rights deprives a parent of any right to see his or her child or to play any role in the child's life. It can mean that a father is no longer a father, or as in this case, a mother is no longer a mother. She is no longer a mother in the eyes of the law, and is no longer a mother in the day to day passage of life.

This ability to terminate a relationship between a parent and a child encompasses an awesome power and entails a correspondingly significant responsibility. There are legitimate reasons, of course, for this power, but only if it is exercised carefully. As part of the exercise of this power, the State of Mississippi has chosen to have the issue of the termination of parental rights presented in the first instance in any given case to a single trial court judge -- a Chancery Court judge -- who is elected by the voters and who sits without a jury. But with a level of care appropriate to the magnitude of the decision, the process in Mississippi does not end with this single judge's decision. Like other states, Mississippi provides an appeal of right for those parents who wish to pursue it, so that appellate judges can review the trial judge's initial determination and reverse the decision if they conclude it is appropriate to do so.

Unfortunately, in this case, a parent has been excluded from a key component of this system because she does not have enough money. Her parental rights have been taken away by a single judge whose decision, she believes, is grievously wrong as a matter of fact and law, but because she cannot afford the price that is being charged, she is not allowed to present her case to the appellate judges who otherwise would hear it and who could restore her rights as a parent to her children.

Certainly, in administering its two-tiered system of judicial decision-making in a case involving such fundamental rights, Mississippi could not, consistent with the principles of the Fourteenth Amendment, limit the right of appeal to, for instance, parents who possess assets worth over $200,000, or whose annual income exceeds over $50,000 a year, and leave everyone else to the reason, the mercy, or the whim of a single trial judge. By excluding the petitioner from her appeal, and refusing even to consider her contention that she

cannot afford the $2,000 plus price that the State court system is charging for the appeal, the Mississippi Supreme Court is doing much the same thing. In view of the fundamental right at issue in this case, the Mississippi Supreme Court's decision should be reversed.

The first section of the remainder of this argument reviews the relevant precedents of this Court. The second section discusses the Mississippi system of appellate review in parental termination cases and the impact it could have on this case if only the petitioner were allowed the same access to it that others have. The third section returns to this Court's precedents and demonstrates how the principles of the Fourteenth Amendment, as explicated by this Court over the years, are violated by the decision of the Mississippi Supreme Court in this case.

I. IN CASES INVOLVING FUNDAMENTAL RIGHTS, THIS COURT'S PRECEDENTS PROHIBIT A STATE FROM DENYING ITS CITIZENS ACCESS TO EXISTING AVENUES IN A COURT SYSTEM SIMPLY BECAUSE THEY ARE POOR.

In a significant line of cases, this Court consistently has protected the right of citizens, no matter their financial station, to pursue fundamental legal interests through existing avenues in state judicial systems. In *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court noted that a state is not required by the Constitution to provide an appeal in a criminal case. But where a state does so, the Court held, it also must provide indigent persons a transcript, or its equivalent, at state expense so they can take advantage of the appeal option irrespective of their financial poverty. This result, said the plurality opinion in *Griffin*, is compelled by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 18-20. As stated by the plurality opinion:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.

Id. at 18. The four-justice plurality in *Griffin* was joined in the result by Justice Frankfurter, who said in his concurrence:

> [W]hen a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such a review . . . .
>
> . . . . If [a State] has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.

Id. at 23-24 (Frankfurter, J., concurring).

In cases after *Griffin*, a majority of this Court has reaffirmed *Griffin* and held that its reasoning is predicated both on the Due Process and the Equal Protection Clauses. *See, Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971); *Evitts v. Lucey*, 469 U.S. 387, 403-405 (1985). Moreover, in several cases decided in the wake of *Griffin*, this Court has invalidated a number of state practices and statutes that denied indigent criminal defendants access to effective appeals because of their inability to pay for transcripts. Among these is *Mayer*, which held that an indigent had the right to provision of a transcript for appeal in a case where he was faced not with imprisonment, but merely with a $500 total fine for two misdemeanor offenses.

Fifteen years after *Griffin*, this Court's decision in *Boddie*

v. Connecticut, 401 U.S. 371 (1971), extended much of the rationale of *Griffin* to civil cases involving fundamental rights. *Boddie* held that the Fourteenth Amendment does not permit a $60 court costs fee to be imposed, as a condition for filing a civil court divorce petition, upon those who cannot afford it. As Justice Harlan's opinion for the Court in *Boddie* explained: "In *Griffin* it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process." 401 U.S. at 382. Connecticut's $60 divorce filing fee does the same thing, said the Court in *Boddie*, adding that "the rationale of *Griffin* covers this case." 401 U.S. at 382. While *Griffin* was predicated both upon the Due Process and Equal Protection Clauses, *Boddie* specifically relied upon the Due Process Clause, holding that it is violated by the application to indigents of a monetary fee that prevents them from access to the courts in a matter involving a fundamental interest such as marriage:

> [G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a state from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

401 U.S. at 374. The Court in *Boddie* also explained that its decision was premised on the fact that resort to the courts was the only means by which people could seek lawful dissolution of their marriages. *Id.* at 376-377.

While *Boddie* extended *Griffin*'s rationale to civil cases involving fundamental rights, this Court's decision in *Lindsey v. Normet*, 405 U.S. 56 (1972), made it clear that the relevant principles from *Griffin* encompass not only civil cases at the trial level, but also those on appeal. *Lindsey* struck down, as

violative of the Equal Protection Clause, an Oregon statutory provision requiring a double appeal bond for tenants who appeal eviction cases. Although *Lindsey* did not involve a transcript fee, as did *Griffin* and as does the present case, this Court's decision in *Lindsey* cited *Griffin* in support of the principle that "[w]hen an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Id.* at 77, *citing Griffin*, 351 U.S. at 18. In declaring the Oregon statute unconstitutional, this Court emphasized its impact on poor people:

> The discrimination against the poor, who can pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be.

Lindsey, 405 U.S. at 79.

Lindsey also made it clear, as have other cases from this Court, *see, Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), that sufficient state action exists to review state appellate procedures under the Fourteenth Amendment even where the only litigants in the case are private litigants.

As previously noted, *Boddie* struck down a $60 divorce filing fee under the Due Process Clause in light of the fact that marriage and divorce implicate a fundamental interest for constitutional purposes. This Court's decisions in *United States v. Kras*, 409 U.S. 434 (1973) and *Ortwein v. Schwab*, 410 U.S. 656 (1973), upheld smaller filing fees where no fundamental rights were involved. *Kras* dealt with a $50 filing fee for a bankruptcy case, which could be paid in installments of as little as $1.28 per week, 409 U.S. at 449, and *Ortwein* involved a $25 filing fee for judicial review of

an administrative reduction in old-age assistance. 410 U.S. at 658. In both cases, the Court specifically relied upon its conclusion that the interests involved were not of the same constitutional magnitude as the marriage interest implicated in *Boddie*. *Kras*, 409 U.S. at 445; *Ortwein*, 410 U.S. at 659.

By contrast, this Court in *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981), held that a parent's interest in resisting a termination of parental rights is a "commanding" one, and this Court's decision in *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), described the interest of "persons faced with forced dissolution of their parental rights" as a "fundamental liberty interest."

In *Lassiter*, this Court concluded that due process does not require appointed counsel for indigent parents in every case involving a potential termination of parental rights. However, said the Court, in light of the importance of the interest, there will be some parental termination cases in which due process will require the appointment of counsel. *Id.* at 31-32. Accordingly, the Court held that state courts must provide, at the very least, a case-by-case determination as to "whether due process calls for the appointment of counsel for indigent parents in termination proceedings," with the question "to be answered in the first instance by the trial court, subject, of course, to appellate review." *Id.* at 32. Four dissenting Justices contended that due process requires the appointment of counsel in all such cases.

In summary, then, *Griffin* and its progeny held that the Due Process and Equal Protection Clauses are violated when access is precluded to state court criminal appeals, even in misdemeanors with no prison terms, because an indigent person cannot afford a transcript. *Boddie* applied that rationale under the Due Process Clause to filing fees in civil cases involving fundamental rights at the trial level, and

Lindsey suggested that a similar rationale applies as part of the Equal Protection Clause in civil appeals. While *Kras* and *Ortwein* concluded that the rationale does not control with respect to small filing fees in cases where no fundamental rights are involved, *Lassiter* and *Santosky* held that the termination of a parent's relationship with his or her child clearly implicates fundamental rights.

II. UNDER THE MISSISSIPPI SUPREME COURT'S RULING, THE PETITIONER IS PRECLUDED FROM AN APPEAL THAT OTHERWISE COULD RESULT IN THE RESTORATION OF HER RIGHTS AS A PARENT TO HER CHILDREN.

The Mississippi Rules of Appellate Procedure require a transcript in any case where the appellant "intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence." Rule 10(b)(2), M.R.A.P. The importance of that rule is illustrated by the present case, where the Chancellor's order cited *no evidence* and gave *no reasons*, other than repeating the statutory language, for the drastic measure of terminating the petitioner's lawful relationship with her children. Pet. App. 8. Thus, a transcript not only is required by the rules, but is necessary for the appellate court, first, to attempt to discern the reasons for the Chancellor's ruling, and second, to see if there was sufficient evidence to support that ruling.[4]

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[4] As mentioned in n. 2 of this brief, the Mississippi Rules of Appellate Procedure permit no practical and effective alternative to the requirement of obtaining a transcript. In the context of criminal cases, this Court has stated: "[a] defendant who claims the right to a free transcript does not, under our cases, bear the burden of proving inadequate any alternatives as may be suggested by the State or conjured up by a court in hindsight." *Britt v. North Carolina*, 404 U.S. 226, 230 (1971). *See also, Mayer v. City of Chicago*, 404 U.S. at 189, 190, 195, 198 (where a criminal defendant appealed on sufficiency of evidence grounds, he "ma[d]e out a colorable need for a complete transcript" and had a right to it "where . . . necessary to assure . . . as effective an appeal as would be available to the defendant with resources to pay his own way.".

Consistent with its uniform practice and its precedent going back many years, the Mississippi Supreme Court refused even to consider the petitioner's claim that she could not afford to pay, in advance, over $2,000 for the statutory costs of the transcript and the other papers constituting the record in this case. The Court did this irrespective of the fact that this case, unlike many other civil cases, involves one of the most fundamental interests that can arise in the law -- the interest of a parent in her relationship with her natural child.

The denial of the petitioner's right to appeal under Mississippi law has prevented her from pursuing an avenue that may well lead to the restoration of her rights as a parent to her children. Mississippi grants an appeal of right in cases like this, and the Mississippi Supreme Court has insisted that the appeal play an integral role in insuring that parental rights are not wrongfully terminated. Consistent with this Court's ruling in *Santosky*, Mississippi has, by statute, adopted the clear and convincing standard of proof before any termination can be ordered. Miss. Code Ann. § 93-15-109. The Mississippi Supreme Court has enforced that standard through detailed appellate review of the evidence, as is clear from the that Court's discussion of the standard in parental termination cases: "This Court has not been reluctant to reverse the lower court when the required burden of proof has not been met." *Vance v. Lincoln County DPW*, 582 So.2d 414, 417 (Miss. 1991).

The Mississippi Supreme Court's searching review has been exemplified in a number of cases, including *Petit v. Holifield*, 443 So.2d 874 (Miss. 1984), where the Court discussed the proof regarding the natural father, who was the

defendant in that case:

> [He] does . . . come close [to meeting the clear and convincing standard] and is 'teetering' on the brink . . . . [If] circumstances continue without improvement over a substantial period of time in the future [his parental rights should be terminated]. . . . He is hardly an ideal parent.

Id. at 878-879. Despite the parental deficiencies of the natural father, the Mississippi Supreme Court in *Petit* reversed the Chancery Judge's finding of clear and convincing evidence, holding that the proof -- while close -- did not meet the required standard.

Indeed, from 1980 to the present, there have been sixteen reported Mississippi Supreme Court cases citing the termination statute, Miss. Code § 93-15-103.[5] Twelve of those sixteen cases involved Supreme Court affirmance or reversal, on the merits, of the grant or denial of termination. Eight of those twelve reviewed trial court termination orders and the other four reviewed trial court denials of termination. Of the eight termination orders reviewed by the Court, three were reversed for a failure to meet the evidentiary standard, *Petit v. Holifield*, 443 So.2d 874 (Miss. 1984); *De La Oliva v. Lowndes County Dept. of Public Welfare*, 423 So.2d 1328 (Miss. 1982); *In Re Adoption of a Female Child*, 412 So.2d 1175 (Miss. 1982), while five were affirmed. *Natural Mother v. Paternal Aunt*, 583 So.2d 614 (Miss. 1991); *Vance v.*

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[5] At the beginning of 1995, Mississippi began utilizing an intermediate Court of Appeals, but appeals still lie to the Supreme Court, which determines whether to keep the cases or send them to the Court of Appeals. See Rules 16-17, M.R.A.P. Court of Appeals opinions are not published. See, *Supreme Court of Mississippi, 1995 Annual Report*, pp. 29, 41.

Lincoln County Dept. of Public Welfare, 582 So.2d 414 (Miss. 1991); *Carson v. Natchez Children's Home*, 580 So.2d 1248 (Miss. 1991); *G.M.R., Sr. v. H.E.S.*, 489 So.2d 498 (Miss. 1986); *Doe v. Attorney W.*, 410 So.2d 1312 (Miss. 1982). Of the four denial orders that were reviewed, two were reversed, *Adams v. Powe*, 469 So.2d 76 (Miss. 1985); *Ainsworth v. Natural Father*, 414 So.2d 417 (Miss. 1982), and two were affirmed. *In the Interest of J.D.*, 512 So.2d 684 (Miss. 1987); *Bryant v. Cameron*, 473 So.2d 174 (Miss. 1985).

These cases demonstrate that, in Mississippi, the appeal from a termination of parental rights is not simply a formality, but instead is a meaningful opportunity for a parent to challenge an adverse lower court decision. The importance of this sort of review in Mississippi is illustrated by the present case, where the complaint alleged no abuse or criminal conduct, but only a failure of the petitioner to maintain constant visitation and support payments; where the petitioner contested this and presented evidence to the effect that the respondent refused to permit reasonable visitation; where there is a question as to whether a lapse in visitation and child support payments for a short period of time, even if true, would be sufficient grounds for termination; and where the Chancery Court's termination order contained no discussion of the evidence and no specific factual findings to support the termination. Pet. App. 8. Those who are financially able in Mississippi can raise these sorts of issues, as well as others, in a parental termination appeal and can obtain a meaningful review of a chancery judge's decision. If the petitioner were allowed in the same appellate courthouse door, she could do the same and the appeal would be her best and last hope to retain her rights as a parent to her children.

III. BY REFUSING TO CONSIDER THE PETITIONER'S CLAIM THAT SHE CANNOT AFFORD TO PAY OVER $2000 AS A PREREQUISITE TO APPEALING THE TERMINATION OF HER PARENTAL RIGHTS, THE SUPREME COURT OF MISSISSIPPI HAS ACTED IN DISREGARD OF THE PRINCIPLES OF THE FOURTEENTH AMENDMENT, AND ITS JUDGMENT SHOULD BE REVERSED.

Given that the rights of a parent in the relationship with a child are among the most important and sacred in our world, and given that Mississippi permits an appeal from decisions of a single judge terminating those rights, the State cannot, consistent with the Fourteenth Amendment, effectuate that appeal only for those who are financially comfortable while closing it to those who are poor. By requiring the petitioner to pay over $2,000 in advance, and by refusing even to consider her claim that she cannot afford this, the Mississippi Supreme Court has run afoul of the principles of due process and equal protection of the law.

This, of course, is the lesson of *Griffin v. Illinois*. While *Griffin* involved a criminal case, its teaching is not limited to criminal cases. This is clear both from *Boddie* at the civil trial court level and *Lindsey* at the civil appeal level. Moreover, it would make absolutely no sense to say that the *Griffin* holding can never be applied in a civil case. The present case is a civil matter, yet the interest of the petitioner -- the interest of a parent in the natural and lawful relationship with her child -- is one of the most important that can be adjudicated in a court of law. This interest is at least equivalent to the marriage relationship in *Boddie*, may well be as important as the interest in physical liberty implicated by *Griffin*, and is far more important than the monetary fine and misdemeanor conviction involved in *Mayer v.*

Chicago.

Indeed, it would be quite absurd to conclude that the petitioner in *Mayer* had a right under the Fourteenth Amendment to a transcript irrespective of his poverty so he could appeal his $500 fine, but that the petitioner in the present case has no right to appeal the termination of her natural and lawful relationship with her children because she cannot pay over $2,000 in advance of the appeal.

A comparison of the interests of the petitioner and those of the government of Mississippi confirms that the Mississippi Supreme Court's action in this case violates the Fourteenth Amendment. As this Court stated in *Lassiter*, the petitioner's interest here is a "commanding" one, 452 U.S. at 24, and as this Court said in *Santosky*, it is a "*fundamental* liberty interest." 455 U.S. at 753 (emphasis added). In *Santosky*, the Court noted that juvenile delinquency, civil commitment, deportation, and denaturalization cases can involve losses of individual liberty, but they are, at least to a degree, reversible actions. A termination of parental rights is different, said the Court:

> Once affirmed on appeal, a . . . decision terminating parental rights is *final* and irrevocable. *Few forms of state action are both so severe and so irreversible.*

Id. at 759 (first emphasis in original; second emphasis added; citation omitted). Justice Stevens pointed out the following in his dissent in *Lassiter*:

> A woman's misconduct may cause the State to take formal steps to deprive her of her liberty. The State may incarcerate her for a fixed term and also may permanently deprive her of her freedom to associate with her child. . . . Although both deprivations are serious,

> often the deprivation of parental rights will be the more grievous of the two.

452 U.S. at 59 (Stevens, J., dissenting).

As is clear from the Mississippi Supreme Court's careful review of parental termination cases, the appeal is a means of insuring accurate determinations in these important matters -- an interest shared by the State and the petitioner. Indeed, this Court has highlighted the role that appellate review plays in promoting accurancy and preventing erroneous decisions in termination cases. *See, Lassiter*, 452 U.S. at 28-29 (stating that appellate review is one of the means by which North Carolina attempts to achieve accurate decisions in parental termination cases); *Santosky*, 455 U.S. at 776 n. 4 (Rehnquist, J., dissenting) (noting the "error reducing power of procedural protections such as . . . appellate review" in parental termination cases). Unfortunately, the Mississippi Supreme Court's judgment in the present case promotes accuracy only for those who can afford to pay a fairly substantial amount of money, but not for those who cannot.

Beyond the interest in accuracy that is promoted by an appeal, *Lassiter* emphasizes that appellate review is an important component in enforcing the due process rights of an indigent parent -- an interest that should be important not only to the petitioner, but to the State. *Lassiter* held that because of the crucial nature of the parental interest, states must, at the very least, conduct a case-by-case analysis to determine "whether due process calls for the appointment of counsel for indigent parents in termination proceedings," with the question "to be answered in the first instance by the trial court, *subject, of course, to appellate review.*" 452 U.S. at 32 (emphasis added). By not allowing appellate review for indigents in termination cases, the Mississippi Supreme Court's policy contravenes the protection of due process

contemplated by *Lassiter*.

The only conceivable interest the government of Mississippi might have in refusing to consider in forma pauperis motions in appeals like this is a financial one. But a reversal in this case is not going to have a significant impact on the state treasury. This case raises only the issue of whether the State Supreme Court can require, in advance, payment of the kind of money involved here as a condition of appealing a termination of parental rights, while at the same time refusing even to consider an appellant's claim that she cannot afford to pay the bill.

As noted in the previous section of this brief, there are only sixteen reported appeals in Mississippi since 1980 citing the State's termination statute, and only twelve of those involved the grant or denial of parental rights. Perhaps there were other appeals, including those that are unreported and those that are reported but did not cite the statute. Even so, the dearth of reported cases is an indication that the overall number of parental termination appeals is not very large. The Mississippi Supreme Court does not release statistics on the number of parental termination appeals, but it does issue an annual report breaking down decisions by subject matter for each year. Although the report does not list a category for parental termination appeals, it apparently includes those within the category of custody cases. In 1995, the State Supreme Court issued only ten decisions in custody appeals, while the intermediate Court of Appeals issued just six. *Supreme Court of Mississippi, 1995 Annual Report*, pp. 23, 42. Parental termination appeals are only a small percentage of the custody appeals inasmuch as terminations are more drastic and less frequent than disputes over custody. In light of all of this, it seems that only a modest number of termination appeals are filed in Mississippi, and the financial impact will be minimal even if people who cannot afford the

fees and costs are now allowed to join those who can. Compared to the resources involved in providing transcripts and record preparation for indigents in the criminal felony and misdemeanor realm, the price for allowing access in parental termination cases will be negligible.

Many of the states in the Union specifically provide for in forma pauperis appeals, including transcripts, in *all* types of civil cases,[6] and several others specifically provide for them in parental termination cases,[7] and they do so without any sort of financial chaos. Indeed, the Mississippi Supreme Court is the only court among the 50 states to take the position that in forma pauperis appeals will not be allowed or

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[6] *See, e.g.*, Alaska R. App. Proc. 209(a); Ariz. Superior Ct. R. App. Proc. --Civ. 24; Cal. Govt. Code §68511.3(a)(3); Cal. R. Ct. 985, 985(i)(9); D.C. Code. §15-712(a); D.C. Ct. App. R. 23; Idaho Stat. §31-3220(1); Ky. Rev. Stat. § 453.190(1); La. Code of Civ. Proc. Arts. 5181(A), 5185(A)(1); Maine R. Civ. Proc. 91(f); Mass. R. App. Proc. 12(a); Mass. Laws Ch. 261, §§ 27A-27F; Minn. Stat. §563.01; *State ex rel. Steinmeyer v. Coburn*, 671 S.W.2d 366 (Mo. App. 1984); *State ex rel. LaRue v. Hitchcock*, 153 S.W. 546 (Mo. 1913); Neb. Rev. Stat. §§ 25-2301, 25-2306; Nev. R. App. Proc. 24; Nev. Rev. Stat. § 12.015; N.M. R. App. Proc. 12-304B(2); N.M. Stat. § 39-3-12; N.Y. Civ. Prac. Law and Rules §§1101, 1102; N.D. R. App. Proc. R. 12(a); Or. Rev. Stat. § 21.605; Penn. R. App. Proc. 551, 552; *Morrison v. Miller*, 579 A.2d 976 (Penn. 1990); R.I. S. Ct. R. 5(b); *Kelly v. Kalian*, 442 A.2d 890 (R.I. 1982); *In Re Shannon*, 308 A.2d 484 (R.I. 1973); *Ex Parte Cauthen*, 354 S.E.2d 381 (S.C. 1987); Tex. R. App. Proc. 40, 53(j)(1); Wash. R. App. Proc. 15.2; *In Re Grove*, 897 P.2d 1252 (Wash. 1995); W.V. Code § 59-2-1.

[7] *See e.g.*, Conn. R. App. Proc. § 4017; *State v. Anonymous*, 425 A.2d 939 (Conn. 1979); Kan. S. Ct. R. 2.04.; Kan. Stat. §§ 38-1125, 38-1593, 38-1685; Mich. R. Ct. 2.002, 5.974(H)(3), 7.219, 7.319; *Reist v. Bay County Circuit Judge*, 241 N.W.2d 55 (Mich. 1976); N.H. S. Ct. R. 48; N.J. R. App. Prac. 2:7-1, 2:7-4; *In Re Gaurdianship of Dotson*, 367 A.2d 1160 (N.J. 1976); Wisc. Code § 814.29; *State ex rel. Girouard v. Circuit Court*, 454 N.W. 2d 792 (Wisc. 1990).

even considered in civil cases. Certainly, Mississippi can absorb any financial consequences involved in allowing poor people access to the appellate avenue that is open to those who are wealthier in parental termination cases. Furthermore, a decision for the petitioner by this Court will not necessarily require the waiver of fees and costs for impoverished appellants across the board in all types of civil appeals. Few interests are as important as those that arise in parental termination cases, and a holding affecting parental termination appeals would not necessarily apply to civil appeals involving interests of a lesser magnitude.[8]

As this Court stated in *Lassiter*, the effort to terminate a parent's relationship with his or her child encompasses an interest that cannot be compromised "absent a powerful countervailing interest." 452 U.S. at 27, *quoting, Stanley v. Illinois*, 405 U.S. 645, 651 (1972). In *Kras*, the Court noted that rights in areas such as marriage cannot be infringed upon without a "compelling governmental interest." 409 U.S. at 446. Here, the Mississippi government's minimal pecuniary interest in refusing even to consider in forma pauperis claims, such as the one made in this case, does not rise to the level of a rational interest, much less an interest that is "powerful" or "compelling."

Indeed, it is doubtful that Mississippi's $100 appeal filing

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[8] In fact, Mississippi, by statute, already allows for waiver of transcript fees and costs for indigents in the only other type of purely civil appeal that might involve interests comparable to those arising in a parental termination case -- civil commitment proceedings for mental illness. Miss. Code §§ 41-21-83 and 41-21-85. While the Mississippi Supreme Court has said that "any right to proceed in forma pauperis in other than a criminal case exists only at the trial level," *Moreno v. State*, 637 So.2d at 202, and "[t]he only exception . . . is an action for post-conviction relief," *id.*, that Court apparently did not consider the State statute regarding civil commitment appeals.

fee could stand in a case involving the fundamental interest of a parent's rights if a parent could not afford it. But here, the petitioner paid that. It was only when confronted with the $2,000 plus bill to be paid in advance that she was forced to ask for in forma pauperis status. The Mississippi Supreme Court's refusal even to consider her request is not supported by a sufficient governmental interest.

The fact that *Lassiter* does not require counsel in every parental termination case is of little importance here. Indeed, *Lassiter* does require a case-by-case determination of whether due process demands appointment of counsel in a given termination case, while the Mississippi Supreme Court's across-the-board rule on in forma pauperis appeals does not allow even that much.[9]

Moreover, it is clear that the right of access to courts is far broader than any right to counsel in those courts. As

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[9] The issue in *Lassiter* was whether "the Due Process Clause requires the appointment of counsel when *a State* seeks to terminate an indigent's parental status." 452 U.S. at 31 (emphasis added). While the presence of the State as an adversarial party and the resulting comparison of litigation resources may affect the analysis in a right to counsel case, it is not relevant to the issue here, where the termination was sought by private parties -- the petitioner's ex-husband and his new wife. The sanction imposed against the petitioner by the state trial judge -- the termination of her parental rights -- is the same sanction that would have been imposed had the State initiated the proceedings and prevailed in the trial court. The right to an appeal is available in Mississippi both to those whose parental rights were terminated in an action instituted by the State and to those who suffered this loss in a case instituted by a private party, and indigents are precluded from that appeal in both situations. Thus, the action of the Mississippi Supreme Court is subject to challenge here independent of whether the State or private parties instituted the proceeding. Further, as noted at page 16 of this brief, state appellate procedures are subject to challenge under the Fourteenth Amendment even in cases involving only private parties.

explained by then-Justice Rehnquist's opinion for this Court in *Ross v. Moffitt*, 417 U.S. 600 (1974), the *Griffin* line of cases involves the right of an indigent person to get his or her foot in the appellate courthouse door. According to the Court in *Ross*, those cases "stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons." 417 U.S. at 607. This Court held in *Ross* that the Fourteenth Amendment does not require the provision of counsel for a discretionary second appeal within a state system or a petition for certiorari to this Court. In so doing, the Court specifically contrasted the basic sort of access to appellate courts represented by *Griffin* with the distinct line of right-to-counsel cases:

> The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. . . . Unfairness results only if indigents are singled out by the State and denied *meaningful access* to the appellate system because of their poverty.

Id. at 611 (first emphasis in original, second emphasis added). Thus, added the Court in *Ross*:

> [The Fourteenth Amendment] does require that the state appellate system be "free of unreasoned distinctions," *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966), and that indigents have an adequate opportunity to present their claims fairly within the adversary system.

Id. at 612.

The point in *Ross* is confirmed by this Court's decisions illustrating that the right of access to appellate courts through

provision of a transcript to those who cannot afford it is far broader than any right to counsel. *Compare*, *Mayer v. City of Chicago* (transcript must be provided to indigent seeking to appeal a misdemeanor conviction with no sentence of imprisonment and only a $500 fine) with *Scott v. Illinois*, 440 U.S. 367 (1979) (no right to counsel for a misdemeanor offense that does not lead to imprisonment), and *Long v. District Court of Iowa*, 385 U.S. 192 (1966) (transcript of habeas corpus hearing must be provided to indigent seeking to appeal denial of habeas relief) with *Murray v. Giaratano*, 481 U.S. 551 (1987) (no right to counsel in a state habeas corpus action, even in death penalty cases).

Certainly, neither *Kras* nor *Ortwein* justifies the Mississippi Supreme Court's action in this case. As noted previously, both cases involved rather small fees -- $50 in *Kras* that could be paid in weekly installments as low as $1.28, and $25 in *Ortwein*. That is a far cry from the present case, where the petitioner did pay a $100 filing fee, but was stymied when the court system required her to pay an additional $2,352.36 in advance. Moreover, both *Kras* and *Ortwein* relied on the fact that the interests there were not comparable to the marriage interest at issue in *Boddie*, while the interest here is at least equivalent to, if not greater than, that in *Boddie*.

In light of all of this, it is clear that the judgment of the Mississippi Supreme Court violates the Fourteenth Amendment. It violates both the Equal Protection Clause, which emphasizes the disparity in treatment by a State among different individuals or classes of individuals, and it violates the Due Process Clause, which emphasizes an individual's fair treatment at the hands of the State. *See, Ross v. Moffitt*, 417 U.S. at 609; *Evitts v. Lucey*, 469 U.S. at 405. This Court's decisions over the years in the relevant cases generally have emphasized both clauses, although some cases focus on one

rather than the other. In terms of the Equal Protection Clause, the Mississippi Supreme Court has excluded some from an appeal involving fundamental rights, not on the basis of the merits of their case, but on the basis of their financial poverty, while allowing complete access for those who have enough money. *See, Griffin v. Illinois*, 351 U.S. at 18-20; *Mayer v. City of Chicago*, 404 U.S. at 193; *Lindsey v. Normet*, 405 U.S. at 77, 79; *Ross v. Moffitt*, 417 U.S. at 611. In terms of the Due Process Clause, the State Courts in Mississippi have treated the petitioner unfairly, as a procedural matter, by taking away her fundamental rights as a parent, while at the same time excluding her -- simply because she cannot pay a $2,000 plus bill in advance -- from the full panoply of safeguards erected by the State to insure an accurate and proper decision. *See, Griffin v. Illinois*, 351 U.S. at 18-20; *Mayer v. City of Chicago*, 404 U.S. at 193; *Boddie v. Connecticut*, 401 U.S. at 374; *Evitts v. Lucey*, 469 U.S. at 403-405; *Lassiter v. Department of Social Services*, 452 U.S. at 24, 32.

The petitioner's life has been turned upside down by the Chancery Court's order terminating her rights, and her existence, as a parent to her children. Quite justifiably, she believes that decision is terribly wrong and she would like to exercise the right granted by Mississippi law to appeal it -- the right to ask the Mississippi Supreme Court to restore her as a parent to her children. Under the principles of the Fourteenth Amendment, the Mississippi Supreme Court should be required to consider her claim that she cannot afford to pay over $2,000 as a pre-condition for exercising this right of appeal. Her status as a parent should not be controlled by how much money she has.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the judgment of the Supreme Court of Mississippi should be reversed and the case remanded for that Court to determine, based on the petitioner's financial condition, whether she can afford to pay the advance costs of $2,352.36, and if not, to permit her to appeal in forma pauperis the Chancery Court decision terminating her rights as a parent.

Respectfully Submitted,

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Dated: May 31, 1996

(6)

No. 95-853

In The

Supreme Court of the United States

October Term, 1995

M.L.B.,

Petitioner,

v.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Mississippi

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Mississippi impinges a fundamental right when it requires all civil appellants to prepay appeal costs?

2. Does the Fourteenth Amendment require the State of Mississippi to subsidize an indigent for the cost of appeal from a trial court decision terminating parental rights?

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STATEMENT

Petitioner M.L.B. and respondent S.L.J. were divorced on June 9, 1992 with respondent being granted the paramount physical and legal custody of their minor children, ages 7 and 9. At the time of the divorce, petitioner was living with a convicted felon who drank heavily and could be violent. While the final decree of divorce allowed petitioner reasonable and liberal visitation rights with the minor children, it also specifically provided that "in no event and under no circumstances shall the wife exercise her visitation with said minor children in the presence of" the convicted felon. Additionally, petitioner was ordered to pay $40.00 a week child support beginning May 1, 1992, to maintain medical insurance on the children, and to pay half of all medical bills not covered by the insurance policy.

Some 17 months later, on November 15, 1993, S.L.J. and his new wife J.P.J. filed a complaint for adoption in the Chancery Court of Benton County, Mississippi seeking to terminate the parental rights of petitioner M.L.B. and to allow J.P.J. to adopt the minor children. The complaint alleged that the petitioner had abandoned and deserted the children; was mentally and physically unfit to train and rear the children; had refused to offer any means of support for the children since the divorce; and had failed to exercise any reasonable visitation rights, even though they were available to her.

The chancery judge, after hearing testimony and evidence on August 18, November 2, and December 12, 1994, ruled that the adoption should be granted. The judge

found that under §§ 93-17-7 and 93-15-103 of the Mississippi Code of 1972 it had been established by clear and convincing evidence that there existed a substantial erosion of the relationship between the natural mother and the minor children which had been caused, at least in part, by petitioner's "serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with the minor children." Pet. App. 8.

Petitioner M.L.B. filed a notice of appeal to the Supreme Court of Mississippi on January 11, 1995. Pet. App. 13. The clerk of the chancery court then estimated the cost of preparing and transmitting the record to be $2,352.36, which included $1,900 for the transcript, $438 for the other papers in the record, $4.36 for binders, and $10.00 for mailing.

Miss. Code Ann. § 11-51-3 (1972) allows for appeal of civil cases, subject to prerequisites such as the requirement of timely notice under Rule 4 of the Mississippi Rules of Appellate Procedure, prepayment of costs pursuant to Miss. Code Ann. § 11-51-29 (1972) and Rule 11(b)(1), M.R.A.P., and, in some cases, posting of bond pursuant to Miss. Code Ann. § 11-51-31 (1972). The per page costs of the transcript and the papers from the record are set by statute. Miss. Code Ann. §§ 25-7-1, 25-7-13(6) (1972). The notice of appeal is filed with the Supreme Court of Mississippi, which thereafter determines whether to retain the case or send it to the intermediate Mississippi Court of Appeals for decision. Rule 16, M.R.A.P. A decision of the Court of Appeals is a final decision unless the Supreme Court of Mississippi grants review pursuant to a writ of certiorari. Rule 17, M.R.A.P.

Rule 10(b)(2), M.R.A.P., requires that a transcript be prepared if the appellant "intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence." The transcript is prepared by the court reporter who is paid two dollars ($2.00) per page. Miss. Code Ann. § 25-7-89 (1972).

On July 10, 1995, the Supreme Court of Mississippi issued an order requiring the petitioner, within fourteen days, to correct certain deficiencies or face dismissal of her appeal. Pet. App. 4. On July 24, 1995, petitioner filed a motion for leave to appeal *in forma pauperis* in the Chancery Court of Benton County, Mississippi. Pet. App. 17. Thereafter, on July 27, 1995, petitioner filed in the Supreme Court of Mississippi a motion to suspend rules, for leave to appeal *in forma pauperis*, and to brief the issue of *in forma pauperis* appeals.

On August 18, 1995, the Supreme Court of Mississippi issued an order denying the motion to suspend rules, for leave to appeal *in forma pauperis*, and to brief the issue of *in forma pauperis* appeals. The decision was based on prior cases which had concluded that the right to proceed *in forma pauperis* in civil cases exists only at the trial level. An order of final dismissal was entered on August 31, 1995. Pet. App. 1-2. The petitioner then filed her petition for writ of certiorari and on April 1, 1996, this Court granted the writ.

SUMMARY OF THE ARGUMENT

As a matter of Due Process and Equal Protection under the Fourteenth Amendment, the right to free transcripts on appeal for indigents exists only in criminal cases and arguably only in those situations where the indigent's personal physical freedom is at issue. Thus, the holding of the Supreme Court of Mississippi that all persons, regardless of their claim, must prepay civil appeal costs is correct. Those rights that exist in criminal appeals should not be extended to civil appeals, as suggested by petitioner, because such an extension would mark a sharp break from the past, creating a new and expansive constitutional right that is not supported by principle and which would result in potentially huge additional expenses being heaped upon the states.

At issue in this case is a rule of general applicability designed to reimburse the State of Mississippi for the actual costs of a service it provides. The requirement that all civil appellants prepay appeal costs is a reasonable requirement which does not directly or significantly interfere with the parent/child relationship. This requirement is rationally related to the legitimate State interests of both helping to offset the cost of the court system, recognized as legitimate in *Ortwein v. Schwab*, 410 U.S. 656 (1973), and in avoiding the potentially large additional expenses that the State would bear if it is forced to subsidize the costs of civil appeals by indigents. Moreover, this Court has never held that a state must pay the costs of an appeal in a civil case.

1. The hearing provided to the indigent in this case fulfilled the requirements of civil due process because it was "fundamentally fair." *Ortwein v. Schwab*, 410 U.S. 656 (1973); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); and *Santosky v. Kramer*, 455 U.S. 745 (1982). Mississippi law provides extensive safeguards, including a high standard of proof, to assure accurate decisions at the trial court level. Prior to termination of her parental rights, petitioner, with the assistance of counsel, was accorded a full evidentiary hearing on the merits in front of a judge trained in the law. She was allowed to testify, to call witnesses on her behalf and to cross-examine adverse witnesses. Her parental rights were terminated only after the hearing and a finding by the chancery judge that there was clear and convincing evidence that the statutory requirements for termination had been shown. These procedures resulted in a hearing which was fundamentally fair and which had a low risk of error. The Constitution has never been construed to require states to provide procedures after a fair trial has been held.

Petitioner in this case seeks a large subsidy. Since the court reporter is paid two dollars ($2.00) per page for preparation of the transcript, subsidizing indigent appellants would require appropriation and expenditure of additional funds. However, prior decisions of this Court hold that such is not required because failure to subsidize the exercise of a fundamental right "does not infringe the right." *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989); *Lyng v. International Union, et al.*, 485 U.S. 360, 368 (1988); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983); and *Harris*

v. McRae, 448 U.S. 297, 316-18 (1980). The decision to subsidize an indigent seeking to appeal an order terminating parental rights is not a matter of constitutional law but is a matter of public policy best left to the discretion of the State legislature. *See, e.g., Helvering v. Davis*, 301 U.S. 619 (1937).

Petitioner's attempt to equate termination of parental rights to loss of physical liberty for Fourteenth Amendment purposes is not supported by history or reason. Prior decisions of this Court establish that the right to appointed counsel and free transcripts for appellate review depend upon the loss of absolute personal freedom and/or stigma associated with criminal conviction, not merely upon deprivation of some liberty or other interest. *See Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). These rights have never been extended beyond that, nor should they be, since both loss of personal freedom and stigma associated with criminal conviction are unlike any other form of deprivation.

Even if *Mathews v. Eldridge*, 424 U.S. 319 (1976) applied – which it does not – the test established therein would be met. Petitioner's interests are far less than in criminal cases and are diminished still further by her being a non-custodial parent. Further, the chance of an erroneous decision by the trial court is minimized by full trial procedural safeguards and a heavy burden of proof. Moreover, the burden on the State of providing such a subsidy would be significant. Once the barrier between criminal and civil cases has been torn down it can only be assumed that the State will be forced to bear the costs of all appeals of indigents wherein "fundamental rights" are allegedly involved. Such appeals arguably would include

all domestic relations matters such as divorce, paternity and child custody and arguably might include all civil appeals. A Pandora's box, without principled basis for distinction, will be opened. In 1995, there were 86,241 civil actions filed in the Chancery and Circuit Courts of the State of Mississippi. Of those, 39,475 were domestic relations cases. *Supreme Court of Mississippi, 1995 Annual Report*, pp. 48, 55.

2. The Equal Protection Clause does not proscribe a state statute of general applicability, even if it has a greater impact on a non-suspect class. *Washington v. Davis*, 426 U.S. 229, 242 (1976). This Court has specifically held that the poor are not a suspect class. *Harris v. McRae*, 448 U.S. 297, 323 (1980). The statute in this case does not distinguish between groups of persons nor does it classify directly on the basis of termination of parental rights. Everyone must prepay appeal cost regardless of the right or claim involved in the appeal. Indigents seeking to appeal termination of parental rights are not affected any more than indigents seeking to appeal other adverse judgments. Moreover, petitioner does not allege that this statute was designed for any reason other than the legitimate legislative goal of covering the costs of providing a discretionary service, the civil appellate system. The result in this case should therefore be the same as in *Schweiker v. Wilson*, 450 U.S. 221 (1981), wherein this Court rejected an equal protection challenge to similar legislation.

ARGUMENT

At issue in this case is a rule of general applicability which requires that appellants pay the actual costs of services provided to them. The State is not constitutionally required to provide appeals. Having chosen to do so, it reasonably concluded that those persons seeking to take advantage of that service – appellants – should pay associated costs such as the transcription of the record. The State's objective is reasonable and its means of accomplishing it constitutional.

Petitioner's focus on the purported "fundamental" right at stake misses the point. The Constitution does not require a state to subsidize the costs of exercising even fundamental rights. Where a statute does not specifically target a particular right or economic class, this Court's precedents require only rational laws and an opportunity to be heard when a fundamental civil right may be lost – not an ironclad opportunity to appeal. The broad new right to subsidized civil appeals proposed by petitioner should be rejected.[1]

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[1] Petitioner's reliance on the notion that the State could not pass a law limiting appeals to people whose income exceeds a certain amount (Pet. Br. 8, 12) is flawed. Such a law would plainly be arbitrary and irrational. By contrast, the requirement at issue is reasonably related to Mississippi's recovery of the costs of litigation instituted by an appellant. Moreover, under petitioner's reasoning, any requirement of a fee or payment of the costs of appeal would be unconstitutional, regardless of the nature of the interests at issue.

I. THE DUE PROCESS CLAUSE IS NOT VIOLATED BY MISSISSIPPI'S FAILURE TO SUBSIDIZE THE COSTS OF AN APPEAL FROM A DECISION OF A LOWER COURT TERMINATING PARENTAL RIGHTS

Petitioner, in her termination of parental rights hearing in the Chancery Court of Benton County, Mississippi, was represented by counsel and was accorded a full evidentiary hearing on the merits in front of a judge trained in the law. This process accorded her an opportunity to be heard which was fundamentally fair. She was thus provided all due process to which she was entitled since prior case law establishes that there is no constitutional right to an appeal. *See District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937) (holding that "[d]ue process does not comprehend the right of appeal . . . "); and *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930) (stating that "the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance."). Although this Court has carved out an exception that states must permit *in forma pauperis* appeals in criminal cases, that exception has not been extended to civil cases. Such an extension should be rejected because it would mark a sharp break from the past, creating a new and expansive constitutional right to a state subsidy that is not supported by principle and which would result in potentially huge additional expenses being heaped upon the states.

A. Petitioner Received Fair and Full Process

1. There is no dispute that the trial below was fair

Petitioner does not allege that she was denied a meaningful opportunity to be heard nor does she allege that the process was not "fundamentally fair." Further, she does not allege that the chancery judge applied the wrong standard of law or that he was other than an unbiased decision maker. Instead, she urges that the Fourteenth Amendment requires that she be accorded an appeal, at taxpayer expense, to challenge the factual findings of the chancery judge – something that no other civil litigant in Mississippi is granted.

At her termination of parental rights hearing, petitioner was represented by counsel and was accorded a full hearing on the merits in front of a judge trained in the law. She was allowed to testify, to call witnesses on her behalf and to cross-examine adverse witnesses. The chancery judge, after hearing testimony and evidence on August 18, November 2, and December 12, 1994, ruled that the adoption should be granted. The judge found that under §§ 93-17-7 and 93-15-103 of the Mississippi Code of 1972 it had been established by clear and convincing evidence that there existed a substantial erosion of the relationship between the natural mother and the minor children which had been caused, at least in part, by petitioner's "serious neglect, abuse, prolonged and

unreasonable absence or unreasonable failure to visit or communicate with the minor children."[2] Pet. App. 8.

This case arose out of a fundamentally fair proceeding. The Due Process Clause of the Fourteenth Amendment requires no more than was accorded to petitioner in this case.

2. The Constitution does not require any procedures beyond the trial court level

The Due Process Clause does not require that states permit appeals of trial court decisions – regardless of how powerful the litigants purported interest is. *See District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937). A state permits an appeal at its discretion. Accordingly, the balancing of interest procedure established in *Mathews v. Eldridge*, 424 U.S. 319 (1976) has never been held to apply beyond the trial court level. The question presented in *Mathews* was *when and in what manner* a hearing would be provided prior to termination of Social Security disability payments. *Id.* at 332-34. The cases relied on by the majority involved challenges to due process procedures in either administrative[3] or *ex parte* quasi-judicial actions[4] negatively affecting rights of individuals prior to notice

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[2] Statutory grounds for termination of parental rights are contained in Miss. Code § 93-15-103, which is reproduced in Appendix "A" of this Brief.

[3] *See, e.g., Board of Regents v. Roth*, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[4] *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Armstrong v. Manzo*, 380 U.S. 545 (1965).

and opportunity to be heard. The balancing of the individual interest against that of the government in *Mathews* was required to ensure that the individual was not erroneously deprived of benefits. Implicit in this reasoning is that the government had the advantage of being able to regulate benefits in its own interest through its own devices. Under these circumstances, "fundamental fairness" required that the individual be given an opportunity to be heard.[5]

B. In Civil Cases, The Due Process Clause Does Not Require A State To Subsidize Costs of People Pursuing Even Fundamental Interests

The State of Mississippi is being asked here to subsidize the costs of indigents appealing their cases. The petitioner in this case does not seek simply to get a waiver of a filing fee as in *Ortwein v. Schwab*, 410 U.S. 656 (1973), but instead seeks to have the State pay the cost of having the record prepared, including preparation of the transcript by the court reporter.[6] However, case law is clear that a state need not provide funds so that people can exercise even fundamental rights. *See, e.g., Lyng v. International Union, et al.*, 485 U.S. 360, 368 (1988) (holding

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[5] Contrary to petitioner's assertions, the necessity of appellate review was not an issue in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). That case established only that "fundamental fairness" under due process does not require that an indigent in a termination of parental rights case have assistance of an attorney in the trial court.

[6] Access to the appellate court would require the State to both waive the filing fee and to subsidize the petitioner in the amount of over $2300 for preparation of the record on appeal.

that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); *see also Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983), which rejected the argument that the exercise of constitutional rights includes an affirmative government funding obligation. Relying on the long-held view that the Constitution is a negative document, this Court held that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549. *See also DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."); *Harris v. McRae*, 448 U.S. 297, 316-18 (1980) (Medicaid need not fund abortions even though abortion is a constitutionally protected alternative).

The statute at issue applies to all civil appeals and all parties – it does not penalize the exercise of particular rights or penalize petitioner while subsidizing others. *Compare Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983) (holding that state tax exemption statute, which effectively eliminated the tax burden of smaller newspapers, "begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises"); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (holding that state unemployment compensation statute, by denying benefits to those unemployed for religious, rather than

economic reasons, "effectively penalizes the free exercise of . . . constitutional liberties.").

The decision to subsidize an indigent seeking to appeal an order terminating parental rights is not a matter of constitutional right but is a matter of public policy best left to the discretion of the state legislature. *See, e.g., Helvering v. Davis*, 301 U.S. 619 (1937), in which Justice Cardozo commented that "The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.* at 640.

C. Interpreting The Due Process Clause To Require States To Subsidize Civil Appeals Would Mark An Unjustified Creation Of A New Constitutional Right

1. This Court has never held that a state must subsidize the costs of an appeal in a civil case

Petitioner does not allege that she was denied a meaningful opportunity to be heard nor does she allege that the process was not "fundamentally fair." Instead, she urges that the Fourteenth Amendment requires that she be accorded an appeal, at taxpayer expense, to challenge the factual findings of the chancery judge. No case of this Court or principle of constitutional law establishes that petitioner is entitled to be subsidized or preferred to other civil litigants for purposes of appeal.

The decision below of the Supreme Court of Mississippi holds that the right to proceed *in forma pauperis* in

civil cases exists only at the trial level.[7] This ruling is in conformity with the decision in *Ortwein v. Schwab*, 410 U.S. 656 (1973), the only case in which this Court has addressed the right of an indigent to an appeal in a civil case. In *Ortwein*, this Court held that Oregon's $25 appellate court filing fee (1) was not a denial of due process, because the petitioners received agency pre-termination evidentiary hearings meeting due process requirements; (2) did not violate the Equal Protection Clause, as unconstitutionally discriminating against the poor, because the fee was rationally justified to meet court expenses; and (3) did not violate the Equal Protection Clause as arbitrary and capricious in allowing others to appeal *in forma pauperis*. This Court specifically rejected appellants reliance on *Boddie v. Connecticut*, 401 U.S. 371 (1971), noting that *Boddie* "was not concerned with post-hearing review." *Ortwein*, 410 U.S. at 659.

Boddie held that indigents seeking a divorce must be allowed access to the trial court without payment of filing fees. The decision was based primarily on the principle that due process requires that those persons who are forced into the judicial process must be given a meaningful opportunity to be heard. *Id.* at 377. It is indisputable that petitioner in this case received a meaningful opportunity to be heard and, indeed, that the trial was "fundamentally fair." Petitioner cannot state a claim under *Boddie*.

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[7] *See also Moreno v. State*, 637 So.2d 200 (Miss. 1994), *Nelson v. Bank of Mississippi*, 498 So.2d 365 (Miss. 1986), and *Life and Casualty Ins. Co. v. Walters*, 190 Miss. 761, 772-74, 200 So. 732 (1941).

The decision in *Boddie* represents the outer limits of indigent court access rights in civil law. Subsequent cases confirm that petitioner is attempting to create new rights that extend far beyond prior case law. *See Ortwein*, 410 U.S. at 659-660 (holding that an administrative hearing is an adequate alternative to court access when a fundamental right is not impinged); *United States v. Kras*, 409 U.S. 434 (1973) (rejecting a challenge to a filing fee by an indigent debtor who sought access to bankruptcy court); and *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (holding that refusal to appoint counsel for indigent parent in parental status termination proceeding does not violate the Due Process Clause of the Fourteenth Amendment). These decisions confirm the limitation of the decision in *Boddie*.

Contrary to petitioner's allegations, the decision in *Lindsey v. Normet*, 405 U.S. 56 (1972) does not support the conclusion that "the relevant principles from *Griffin* encompass not only civil cases at the trial court level, but also those on appeal." Pet. Br. 15. *Lindsey* addressed a statute that imposed a requirement of posting a double bond only on tenants evicted under a forcible entry and wrongful detainer statute. The Court invalidated this requirement on traditional equal protection grounds because it arbitrarily and irrationally distinguished between classes or types of appellants. *Lindsey*, 405 U.S. at 79. No such distinction exists in the present case which involves a statute applicable to all civil cases and parties. Moreover, petitioner's conclusion is further contradicted by the fact that *Lindsey* reaffirmed that the Due Process Clause does not require a State to provide appellate review if a full and fair hearing on the merits has been

provided. *Id.* at 77. Finally, if the decision in *Lindsey* had made it clear that the principles of *Griffin* and its progeny apply to civil cases, then *Lassiter* would have been decided differently.

The Circuit Courts of Appeal which have addressed the issue of prepayment of appeal costs have rejected the arguments raised by petitioner herein. The Fifth Circuit Court of Appeals in *Nickens v. Melton*, 38 F.3d 183 (CA5 1994), relying on this Court's decisions in *Ortwein*, *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937) (holding that "[d]ue process does not comprehend the right of appeal."); and *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930) (stating that "the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance."), held that Miss. Code Ann. § 11-53-17 (1993) allows a petitioner to proceed *in forma pauperis* at the trial court level and therefore provides adequate post-deprivation remedies to satisfy due process. *Id.* at 185; *See also Edward B. v. Paul*, 814 F.2d 52 (CA1 1987); *Hill v. State of Michigan*, 488 F.2d 609 (CA6 1973), *cert. denied*, 416 U.S. 973 (1974); *Piatt v. MacDougall*, 773 F.2d 1032 (CA9 1985); *Otasco, Inc. v. United States*, 689 F.2d 162 (CA10 1982), *cert. denied*, 460 U.S. 1069 (1983).

2. There Are Sound, Indeed Compelling, Reasons To Distinguish Criminal Appeals From Civil Appeals

Petitioner's attempt to equate termination of parental rights to loss of physical liberty for Fourteenth Amendment purposes is not supported by history or reason. The

interest involved in the criminal context is in stark contrast to the personal interest involved and the historical background of the parent-child relationship. The decision in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) implicitly recognized this distinction.[8] This Court's holding in *Griffin v. Illinois*, 351 U.S. 12 (1956), that the Fourteenth Amendment requires free transcripts for appellate review of criminal convictions, should therefore not be extended to civil cases.

The due process and equal protection decisions in the criminal context are premised on the concept that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin*, 351 U.S. at 17. Criminal punishment implicates both the universal, ancient and fundamental high regard for the protection of physical liberty and a stigma unlike any other. Such punishment is categorically and fundamentally different from the personal interest involved and the historical background of the parent-child relationship. Prior decisions of this Court establish that the right to appointed counsel and free transcripts

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[8] It is noted that in Colonial America the parent was considered an agent of the community given the job of raising desirable and productive citizens. Widely varied laws were passed by different communities to ensure that the parents performed their obligations. If the parents failed in their obligations, the child was removed from the home. The parent-child relationship was not mentioned in the Constitution because the diversity of values on the issue could not be encompassed in one simple formula. See Giovannoni & Becerra, *Defining Child Abuse* (1979), pp. 31-75, for an extensive discussion of the legal relationship between parents, their children, and the state.

for appellate review depend upon the loss of absolute personal freedom and/or stigma associated with criminal conviction, not merely upon deprivation of some liberty or other interest. *See Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). These rights have never been extended beyond that, nor should they be, since both loss of personal freedom and stigma associated with criminal conviction are unlike any other form of deprivation. Further, abuse of the criminal process can quickly subjugate civil liberties.

In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court acknowledged that the magnitude of the interest involved, and by implication the need for counsel and appellate process, is greater in a criminal case than in civil matters:

> When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."

Id. at 755, quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979). For this reason, criminal defendants also receive a panoply of procedural protections to which no civil litigant is entitled.

The difference between the interest involved in criminal and civil actions is illustrated by the right to counsel cases. The decision in *Powell v. Alabama*, 287 U.S. 45 (1932) established the constitutional rule that indigent criminal defendants have a right to appointed counsel. The right

to appointed counsel becomes less absolute when no criminal prosecution is involved. Thus, there is no absolute right to counsel at parole and probation revocations even when personal freedom is at stake. *See, e.g., Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (holding that an absolute right to appointed counsel does not exist when something less than the defendant's "absolute liberty" is at risk); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (holding that defendant had already lost his "absolute liberty" by virtue of his conviction and that what remained was "conditional liberty").

The decision in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) confirms that civil cases require far fewer procedural safeguards than criminal cases. This Court in *Lassiter* considered and rejected the contention that termination of parental rights cases should be treated like criminal cases for due process purposes. Plaintiff, an indigent, argued that she had been denied Fourteenth Amendment Due Process when the State failed to provide counsel in her termination of parental rights case. This Court pursued a two-step inquiry. First, it held that prior criminal and civil due process decisions establish a presumption that "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.* at 26-27. This presumption was derived from *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), in which this Court declined to grant indigent probationers an absolute right to counsel at probation revocation proceedings, and from *Scott v. Illinois*, 440 U.S. 367 (1979), in which this Court refused to require counsel for an indigent criminal defendant whose conviction did not result in imprisonment. This presumption was balanced against

the *Mathews* factors of state interest, private interest, and risk of error in existing procedures. *Lassiter*, 452 U.S. at 27. The majority concluded that a parent's interest in the custody and care of his or her child is a compelling one, the termination of which "work[s] a unique kind of deprivation." *Id.* at 27. However, it was concluded that the absence of counsel did not render the hearing "fundamentally unfair" and did not deprive Lassiter of due process. *Id.* at 33.

The decision in *Lassiter* establishes that: (1) the magnitude of personal interests in a criminal case is much greater than in a termination of parental rights case; and (2) there are separate due process requirements for criminal and civil litigants.

Petitioner's contention that the right of access to appellate courts in the criminal context is far broader than any right to counsel, is not supported by law or reason. The vast majority of cases, both criminal and civil, are won or lost at the trial court level. Certainly, petitioner's reliance on the decision in *Ross v. Moffit*, 417 U.S. 600 (1974), as support for this conclusion, is misplaced. The question raised there was whether the State had to furnish counsel for a second and subsequent appeals. *Id.* at 602-03. This Court concluded that not furnishing counsel for such review, unlike not furnishing counsel for initial appeals, did not operate to deny meaningful access to appellate review. Additionally, access did not include the cost of a transcript. *Id.* at 615. The decision in *Ross* provides no support for petitioner's suggestion that right to an appellate transcript is broader than right to assistance of counsel at the trial court level or on the first

appeal.[9] At most, *Ross* arguably stands for the conclusion that right to waiver of an appellate filing fee is broader or more important than assistance of counsel in second and subsequent appeals.

Cases such as *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) and *Ortwein v. Schwab*, 410 U.S. 656 (1973) establish that the right to free transcripts for appellate review depend upon the loss of absolute personal freedom and/or stigma associated with criminal punishment, not merely upon deprivation of some liberty or other interest. These cases also support the conclusion that the decision in *Mayer v. Chicago*, 404 U.S. 189 (1971), relied upon by petitioner herein, simply does not apply in a civil case. This Court distinguished *Mayer* from a civil case by acknowledging that the practical effect of conviction of even a petty offense could be as detrimental to the accused as forced confinement. 404 U.S. at 197. *Mayer* is also distinguished by the fact that there is a much greater likelihood of error in the trial of even a petty criminal offense under the *Mathews* formula because of complicated evidentiary and procedural rules.

3. Even assuming arguendo that *Mathews* were applicable to the appeals context, its requirement of "fundamental fairness" is met in this case

Even if *Mathews v. Eldridge*, 424 U.S. 319 (1976) were applicable to an appeal, which it is not [*see supra* at

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[9] This is true also of the decision in *Long v. District Court of Iowa*, 385 U.S. 192 (1966), which combined the issues of physical liberty and an easily available transcript. *Id.* at 194-95.

§I(A)(2)], the process provided to the indigent in this case met its requirement of "fundamental fairness." Determining "fundamental fairness" in a particular situation requires a two-step analysis. *Lassiter*, 452 U.S. at 24-25. First, a court must determine whether the challenged state action implicates a protected property or liberty interest. *Board of Regents v. Roth*, 408 U.S. 564, 569-72 (1972). Then, if such a protected interest is involved, the court must determine what process is due before an individual may be deprived of that interest. The second determination may be made by applying the test established in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

This process requires that the fairness and reliability of the existing procedures be considered before a determination can be made that the Constitution requires more. *Mathews*, 424 U.S. at 343. This broad inquiry is necessary for determination of whether the procedure used satisfies the "fundamental fairness" requirement of due process. *Santosky*, 455 U.S. 745, 775 (1982).

An analysis of the test explicated in *Mathews* shows that the process accorded petitioner in this case was

"fundamentally fair" and constituted all process which she was entitled to under the Constitution.

a. Petitioner's interests are significantly less than in a criminal case

Respondents incorporate their discussion contained in §I(C)(2) of this brief in support of this argument. That discussion shows that petitioner's attempt to equate termination of parental rights to loss of physical liberty for Fourteenth Amendment purposes is not supported by history or reason. Moreover, petitioner's interest in the care, custody and control of her children in this case became qualified or conditional when she lost custody, as a result of her actions, in the original divorce proceeding. Her subsequent failure to show any meaningful concern for their welfare caused that relationship to devolve into a purely biological relationship devoid of any meaningful association. Petitioner does not allege that she is a good parent. Instead, she alleges that the evidence was not clear and convincing enough to establish that she is such a bad parent that her parental rights should be terminated. When that interest is balanced against the interests of the children it becomes something less than fundamental and requires less constitutional protection. *See Quillion v. Walcott*, 434 U.S. 246, 255 (1978), wherein this Court held that neither the consent of nor a showing of unfitness of the natural father was necessary for adoption in a situation where the father had not raised or legitimated

his children. *Quillion* establishes that substantive family rights depend, in part, on parental conduct.[10]

b. Risk of erroneous deprivation in a termination of parental rights case is small

The risk that parents will be erroneously deprived of their parental rights because of lack of appellate review is low in these cases. Mississippi law provides extensive safeguards to assure accurate decisions at the trial court level: A petition for termination of parental rights may be filed only in the county in which a defendant or the child resides, or in the county where an agency or institution holding custody of the child is located. Miss. Code § 93-15-105(1). The mother of the child, the legal father of the child, and the putative father of the child, when known, must be made parties defendant. A guardian ad litem must be appointed to represent the interest of the child. Miss. Code § 93-15-107. The petition is not triable by the chancery court until 30 days after service of process is complete. Miss. Code § 93-15-105(1). Findings of fact are made by a chancery judge sitting without a jury and must be based on clear and convincing evidence showing that one of the grounds exists for termination. Miss. Code § 93-15-109.[11] Chancery courts are courts of

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[10] "Parental rights do not spring full blown from the biological connection between parents and children. They require relationships more enduring." *Caban v. Mohammed*, 441 U.S. 389, 397 (1979) (Stewart, J., dissenting).

[11] The clear and convincing standard of proof is designed to lessen the number of factual errors. As stated in *Santosky v. Kramer*, 455 U.S. 745 (1982): "Unlike a constitutional

record subject to the Mississippi Rules of Civil Procedure and the Rules of Evidence, which are modeled after the Federal Rules of Civil Procedure and Rules of Evidence.

In accordance with these detailed rules and procedures, petitioner, who was represented by counsel, was accorded a full hearing on the merits in front of a judge trained in the law. See discussion *supra* at **§I(A)(1)**.

Petitioner characterizes the trial as hotly contested but then states that the primary error that she intends to urge on appeal is that the chancery judge's decision was unsupported by, and contrary to, the evidence presented. Such assignments of error are rarely successful since they are reviewed under the manifest error/substantial credible evidence test. *See Vance v. Lincoln County DPW*, 582 So.2d 414, 417 (Miss. 1991).

The combination of detailed statutory requirements for termination of parental rights, a high standard of proof, and an elaborate evidentiary hearing with the assistance of counsel resulted in a negligible risk of error in this case. *See Lassiter*, 452 U.S. at 32 (recognizing that termination of parental rights case "presented no specially troublesome points of law, either procedural or substantive.").

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requirement of hearings, see, *e.g.*, *Mathews v. Eldridge*, 424 U.S., at 347, or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." *Santosky*, 455 U.S. at 767.

c. The State has a strong interest in having litigants bear the costs of appeals

The third prong of the *Mathews* test requires an analysis of the function and the burden the additional requirement would put on the State. Since protection and best interest of the child is the focus of the State in termination proceedings and since procedural safeguards minimize the possibility of an erroneous decision by the trial court, the State should not be forced to subsidize the appeal of one litigant, the losing side, in civil cases.

The burdens that petitioner would place upon the State in this case are much greater than those recognized in *Ortwein v. Schwab*, 410 U.S. 656 (1973), in which this Court noted that the purpose of the $25 filing fee helped offset the operating cost of the court system. Here, by contrast, the State would both lose filing fees to help offset the cost of the appellate court system and also be forced to expend potentially large amounts of money to subsidize individuals.[12] A large part of the additional expense associated with an appeal is due to the fact that the court reporter must be paid for the additional work of transcribing and preparing the trial record. Under these circumstances, it is only reasonable that the appealing party, the user of the additional services, should be required to pay for them.

Once the barrier between criminal and civil cases has been torn down it can only be assumed that the State will

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[12] The fact that other States, through legislative enactment, choose to subsidize indigents by providing transcripts in civil actions has no bearing on the issue of constitutional entitlement.

be forced to bear the costs of all appeals of indigents in a wide variety of cases. Litigants will spare no time in contending that their interests are "fundamental." A Pandora's box, with no principled basis for distinction, will be opened. Such appeals would arguably include all domestic relations matters such as divorce, paternity and child custody, as well as other cases where "important" interests are litigated.

The quantity of such subsidized cases would be significant. In 1995, there were 63,765 civil actions filed in the Chancery Courts of the State of Mississippi. Of those, 39,475 were domestic relations cases. This compares to 15,487 criminal dispositions and 22,476 civil filings in the Circuit Courts of the State of Mississippi. *Supreme Court of Mississippi, 1995 Annual Report*, pp. 55, 48. A breakdown of the chancery court statistics reveals that of the 63,765 civil actions filed, 194 involved termination of parental rights, 1027 involved custody or visitation, and 6080 were paternity cases. Of those cases decided on the merits by the Supreme Court of Mississippi in 1995, 194 were first appeals of criminal convictions, 40 involved domestic relations and 10 involved custody. *Id.* at 23. Of those cases disposed of by the Court of Appeals in 1995, 298 were first appeals of criminal convictions, 27 involved domestic relations and 6 involved custody. *Id.* at 42.[13]

The function of the State in a termination of parental rights action is to protect the physical well-being of a

[13] It should be correct to assume that the number of appeals of domestic relations matters will substantially increase once they are available at taxpayer expense. It is also possible that these types of appeals will outnumber criminal appeals.

child, *See In re Gault*, 387 U.S. 1, 16 (1967), and to provide initially an adjudicatory forum for litigants as in other civil actions where important interests are at stake. If criminal procedures are required the character of the proceeding becomes quasi-criminal with the goal being punishment instead of protection. Additionally, the function of the State will be changed because of other cases brought against indigents involving important liberty and property interests. The traditional position of the State, as neutral provider of an adjudicatory forum for disputes between civil litigants, will be transformed. This will be true even if, as in the present case, the State is not a party to the action.[14]

It is simply not reasonable to impose these additional functions and potentially huge additional costs upon the State when, as here, the parent has been accorded a "fundamentally fair" hearing in the trial court. The actions of the State in this case – the provision of a system of civil appeals in which all litigants must pay the costs of appeal – do not directly or substantially interfere with the parent/child relationship and are otherwise reasonably related to a legitimate State interest. *See Lyng v. Castillo*, 477 U.S. 635 (1986) (holding that federal food stamp program amendments narrowing the definition of household did not burden a fundamental right because it did not directly and substantially interfere with family living arrangements); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)

[14] The underlying dispute in this case was between two private litigants. The State did not initiate the termination proceedings, but only provided the adjudicatory forum and the substantive standard to be applied by the chancery judge.

(noting that reasonable regulations of the fundamental right to marry may legitimately be imposed); *Califano v. Jobst*, 434 U.S. 47 (1977) (upholding regulation terminating benefits upon marriage as rationally related to governmental interest); and *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (if no strict scrutiny, the legislation will be upheld unless it is "without any reasonable basis and . . . is purely arbitrary.").

II. THE EQUAL PROTECTION CLAUSE IS NOT VIOLATED BY MISSISSIPPI'S FAILURE TO SUBSIDIZE THE COSTS OF AN APPEAL FROM A DECISION OF A LOWER COURT TERMINATING PARENTAL RIGHTS

The cases upon which petitioner relies to overcome the doctrinal weakness of her position fare no better under an equal protection guise than they did under a due process guise. *See supra* **§I**. At worst, the Mississippi statute in question has a greater impact on a non-suspect class, the poor. Under this Court's equal protection precedents, such a statute could not possibly violate the Equal Protection Clause, at least outside the criminal context.

A. The Equal Protection Clause Does Not Proscribe State Statutes – Such As The One At Issue – Which Are Of General Applicability And Purportedly Have A Greater Impact On A Non-Suspect Class

Mississippi requires all civil appellants to pay the costs of appeal. The requirement is not limited to particular types of actions nor to particular types of appellants. Everyone must prepay appeal costs regardless of the

right or claim involved in the appeal. Petitioner has never contended, nor should she, that Mississippi designed the rule for any reason other than the perfectly reasonable one of obtaining the costs of providing a discretionary service. Mississippi's legislature has not been shown to bear any animus against the indigent nor any intent to single them out. This alone resolves the equal protection issue.

In *Washington v. Davis*, 426 U.S. 229, 242 (1976), this Court rejected the argument that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may effect a greater proportion of one race than of another." This must be all the more true with respect to an allegedly disparate impact on a class that, unlike race, is not suspect. This Court has specifically held that the poor are not a suspect class. See *Harris v. McRae*, 448 U.S. 297, 323 (1980) (quoting *Maher v. Roe*, 432 U.S. 464 (1977), which in turn cited *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 111 (1973) and *Dandridge v. Williams*, 397 U.S. 471 (1970)).

The result here should therefore be the same as in *Schweiker v. Wilson*, 450 U.S. 221 (1981), in which this Court rejected the contention of residents of public mental institutions (appellees) that the SSI program violated the equal protection component of the Fifth Amendment's Due Process Clause because it excluded from eligibility anyone who is an "inmate of a public institution." The Court concluded that the appellees' claim suffered from a fatal flaw, fully applicable here – the statute did not discretely classify based upon the alleged class (the mentally ill). Rather, the statute excluded from eligibility a larger group (inmates of public institutions), of which

the mentally ill were a subset. After noting that "appellees failed to produce any evidence that the intent of Congress was to classify on the basis of mental health," the Court held that "the indirect deprivation worked by this legislation upon appellees' class, whether or not the class is considered 'suspect' does not without more move us to regard it with heightened scrutiny." *Id.* at 234.[15] The Court then upheld the statute after concluding that it "advanced legitimate legislative goals in a rational fashion." *Id.* at 234-39. The same result must obtain here.

B. This Court's Decisions in *Griffin* and *Boddie* Do Not Support Petitioner's Equal Protection Claim

The majority opinion in *Griffin v. Illinois*, 351 U.S. 12 (1956), refused to choose between the Equal Protection and Due Process Clauses as the basis for its conclusion that an indigent criminal defendant must be provided with a free transcript when an appeal of right exists. However, the vigorous dissent of Justice Harlan in that and subsequent cases contended that appellate review of criminal convictions were mandated by procedural due process.[16] This interpretation was subsequently accepted as to civil access fees in *Boddie v. Connecticut*, 401 U.S. 371 (1971), when Justice Harlan wrote the majority opinion invalidating the fee requirement on due process grounds.

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[15] The Court therefore did not address whether classifications based upon mental illness warrant heightened scrutiny.

[16] *See, e.g., Douglas v. California*, 372 U.S. 353, 361, 363-64 (1963) (Harlan, J., dissenting); *Griffin v. Illinois*, 351 U.S. 12, 36 (1956) (Harlan, J., dissenting).

The holding in *Boddie* was narrowed by the decision in *United States v. Kras*, 409 U.S. 434 (1973), where this Court refused to apply the monopolization rationale of *Boddie* in the context of bankruptcy filing fees, thus undermining the idea of a fundamental rights equal protection doctrine.[17] *See also Dandridge v. Williams*, 397 U.S. 471 (1970) which applied minimum rationality review to an equal protection challenge to the policy of capping AFDC benefits for large families. The majority opinion rejected heightened scrutiny despite acknowledging that "the most basic economic needs of impoverished human beings" were at issue. *Dandridge*, 397 U.S. at 485. This opinion was reinforced in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), rejecting an equal protection challenge to the state scheme for funding education which created a spending disparity across school districts. The majority rejected the suggestion that education was a fundamental right and declared that a fundamental right would be found for equal protection purposes only if it were explicitly embraced in, or implicitly derived from, the constitutional text. *Rodriguez*, 411 U.S. at 29-30, 33-34.

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[17] *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 286-87 (1991). The author concludes that in cases such as *Dandridge v. Williams*, 397 U.S. 471 (1970) and *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973) "the door to the discovery of new fundamental rights was firmly shut."

Griffin and its progeny simply do not support petitioner's claim in this case that her equal protection rights have been violated.[18]

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[18] If a new rule is created in this case, it should have prospective application only based on an analysis of the factors to be considered in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971). A new rule requiring the State to subsidize costs of indigents appealing termination of parental rights is plainly an issue of first impression which was not foreshadowed by this Court. In fact, such a rule would appear to contradict the decision by this Court in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). Additionally, no child who has been freed for adoption, and certainly no child who has been adopted, should be burdened with the uncertainty and fear associated with an attempt to overturn the termination because the indigent parent was not provided a free transcript for appeal.

CONCLUSION

The order of the Supreme Court of Mississippi dismissing petitioner's appeal for failure to prepay costs should be affirmed.

Respectfully submitted,

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APPENDIX "A"

Section 93-15-103, Mississippi Code Annotated, as amended, addresses termination of parental rights as follows:

> "(3) Grounds for termination of parental rights shall be based on one or more of the following factors:
>
> (a) A parent has deserted without means of identification or abandoned and made no contact with a child under the age of three (3) for six (6) months or a child three (3) years of age or older for a period of one (1) year; or
>
> (b) A parent has been responsible for a series of abusive incidents concerning one or more children; or
>
> (c) When the child has been in the care and custody of a licensed child caring agency for at least one (1) year, that agency has made diligent efforts to develop and implement a plan for return of the child to its parents, and;
>
> (i) The parent has failed to exercise reasonable available visitation with the child; or
>
> (ii) The parent, having agreed to a plan to effect placement of the child with the parent, fails to implement the plan so that the child caring agency is unable to return the child to said parent; or

(d) The parent exhibits ongoing behavior which would make it impossible to return the child to the parent's care and custody:

(i) Because the parent has a diagnosable condition unlikely to change within a reasonable time such as alcohol or drug addiction, severe mental deficiencies or mental illness, or extreme physical incapacities, which condition makes the parent unable to assume minimally, acceptable care of the child; or

(ii) Because the parent fails to eliminate behavior, identified by the child care agency or the court, which prevents placement of said child with the parent in spite of diligent efforts of the child caring agency to assist the parent; or

(e) When there is an extreme and deep-seated antipathy by the child toward the parent or when there is some other substantial erosion of the relationship between the parent and child which was caused at least in part by the parent's serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate, or prolonged imprisonment; or

(f) When a parent has been convicted of any of the following offenses against his natural or adopted child: (i) rape of a child under the provisions of Section 97-3-65, (ii) sexual battery of a child under the provisions of Section 97-3-95(c). (iii) touching a

child for lustful purposes under the provisions of Section 97-5-23, (iv) exploitation of a child under the provisions of Section 97-5-31, (v) felonious abuse or battery of a child under the provisions of Section 97-5-39(2), or (vi) carnal knowledge of a step or adopted child or a child of a cohabiting partner under the provisions of Section 97-5-41.

No. 95-853

IN THE
Supreme Court of the United States
October Term, 1995

M.L.B.,

Petitioner,

v.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J.,

Respondents.

On Writ of Certiorari To The Supreme Court of Mississippi

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

We noted in our opening brief that this Court's decisions in the access to justice cases have been grounded in both the Due Process and the Equal Protection clauses, with some decisions relying upon one rather than the other. Our contention is that the Mississippi Supreme Court's judgment in this case violates both clauses. Brief for Petitioner 30-31. The respondent's brief, prepared by the Mississippi Attorney General's office in defense of the judgment of the Mississippi Supreme Court, is essentially organized into four substantive areas of argument, the first three dealing with the Due Process Clause and the last with the Equal Protection Clause. But many of the points we make in this reply brief regarding the first three arguments are pertinent not only to the due process issue, but to the equal protection question as well.

The four areas of argument in the State's brief are the following: (1) The trial in this case was "fundamentally fair" with a low risk of error; appeals in these sorts of cases are "rarely successful"; and because there is no federal constitutional right to an appeal, there is no constitutional infirmity in excluding those who cannot afford the price the State is charging. Brief for Respondents 5, 10-12, 25-26. (2) A ruling in the petitioner's favor would require the State to "subsidize" the "actual costs" it must pay for transcripts; these costs would be "potentially huge"; and a "Pandora's box" would be opened in which civil litigants in all types of cases would be able to claim free transcripts. *Id.* 4, 12-14, 27-30. (3) Although indigent defendants in felony and misdemeanor criminal cases are entitled under the Fourteenth Amendment to pursue existing appellate avenues even if they cannot afford the fees and costs charged by the state, the underlying Fourteenth Amendment principles do not apply to any civil cases. *Id.* 4, 14-22, 24-25. (4) Because Mississippi requires all civil appellants to pay the fees and costs involved in an appeal, and has not singled out any particular group of

appellants, there is no violation of the Equal Protection Clause. *Id.* 30-34.

In this reply, we address the first three in turn, discussing concepts related both to the due process and equal protection points. We then address the fourth, which is focused purely on the equal protection issue.

Before that, however, we reply to the effort of the Attorney General's office in its brief to embroil itself in the underlying merits of this case by choosing up sides on matters that are not before this Court. Rather than simply defend the judgment of the Mississippi Supreme Court, which was unrelated to the merits but was premised solely upon the petitioner's inability to pay some $2300, the Attorney General's office goes outside of the existing record, taking the side of the father and his new wife to suggest that the Chancellor was correct in terminating the petitioner's parental rights. In doing so, the brief claims "[a]t the time of the divorce, petitioner was living with a convicted felon who drank heavily and could be violent," *id.* 1, the petitioner lost custody of her children in the original divorce proceeding "as a result of her [own] actions," she subsequently failed to show "any meaningful concern for [her children's] welfare," her relationship with them was "a purely biological relationship devoid of any meaningful association," and her interests are counter to "the interests of the children." *Id.* 24.

Of course, the Attorney General's office was not involved in the trial of this case, so it has no knowledge of the evidence presented. It is not relying upon a transcript of the trial, since there is none. None of the pleadings in the record support the allegations it is making in this Court. The complaint itself did not allege any sort of abuse or dangerous conduct by the petitioner, but contended only that she had not kept up visitation and child support payments, and even to

that extent, the complaint was disputed by the petitioner. The prior divorce decree reflects only that the petitioner agreed to the custody arrangement and in no way suggests that she lost custody "as a result of her [own] actions."

Even if Rule 10(b) of the Mississippi Rules of Appellate Procedure did not specifically require a transcript for a merits appeal in a case like this, these uncited and unsupported allegations illustrate the need for a transcript in the Mississippi Supreme Court so the petitioner can respond to such claims. In light of the absence of a transcript, and because this is neither the time nor the place to argue the merits of the underlying appeal -- except to point out that Mississippi law provides a meaningful appeal for those who can afford it and that the petitioner could take advantage of that appeal if she had the money, *see*, Pet. Br. 18-21 -- we respond no further to these assertions. Suffice it to say that the petitioner cares deeply about her children and properly believes she has a strong case on the merits.

I. WHETHER OR NOT THE TRIAL WAS "FUNDAMENTALLY FAIR," AS THE RESPONDENT CONTENDS, THE FOURTEENTH AMENDMENT IS VIOLATED BY THE PRECLUSION OF THE PETITIONER FROM A MEANINGFUL APPEAL AVAILABLE TO OTHERS, DUE ONLY TO HER INABILITY TO PAY THE STATE OVER $2,000 IN ADVANCE.

Repeatedly, the brief submitted on behalf of the State of Mississippi contends that the trial here was "fundamentally fair," Resp. Br. 5, 9-11, 14-15, 23-24, 29, and that because this Court has never recognized a constitutional right to an appeal *per se*, there can be no constitutional violation in denying to the petitioner the appeal available under Mississippi law to others with more money. *Id.* 9, 11, 16-17.

The brief also claims that there is "a negligible risk of error in this case" and that appeals in a case like this one are "rarely successful." *Id.* 26.

In terms of "fairness," the respondent asserts in one of the subheadings of its brief that "[t]here is no dispute that the trial below was fair." *Id.* 10. In fact, there is a dispute. Although it perhaps reflects a difference in semantics, the petitioner contends that the trial was unfair, and that she was deprived of her relationship with her children on evidence that is irrelevant and does not meet the requirements of Mississippi law and the Fourteenth Amendment. *See,* Miss. Code § 93-15-109; *Santosky v. Kramer*, 455 U.S. 745 (1982). Of course, this contention is properly presented to the Mississippi appellate courts in an appeal on the merits, as is the respondent's claim that she received a fair trial.

What is germane in this Court is the fact that the State of Mississippi has created a right of appeal in recognition of the fact that trial proceedings are not infallible and are not free of error. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 28-29 (1981) (appellate review is a means of reducing the risk of error in parental termination cases). Whether a litigant was denied certain procedural protections, and whether his or her parental rights were terminated improperly in light of the evidence, are matters the State allows to be raised in such appeals. Mississippi law does not limit those appeals to the sort of structural process issues upon which the respondent's brief relies in this Court. Resp. Br. 5, 10. Thus, the respondent's repeated claims of "fairness" at the trial level are beside the point at this stage of this case.

Although this Court has never interpreted the Constitution to require states to establish appellate review in the first place, the Court has held many times -- both in civil

and criminal cases -- that once a state establishes a right of appeal, the right may not be granted to some and arbitrarily denied to others. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Ross v. Moffitt*, 417 U.S. 600, 611 (1974); *Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). This is independent of whether any due process violations occur in the trial court. As this Court said in *Ross*, the Fourteenth Amendment requires "that the state appellate systems be 'free of unreasoned distinctions,' . . . and that indigents have an adequate opportunity to present their claims fairly within the adversary system." 417 U.S. at 612 (citation omitted). "Unfairness results," according to the opinion in *Ross*, "if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty." *Id.* at 611. While *Ross* involved a criminal defendant, this Court did not limit itself in the language just quoted to criminal cases. Moreover, this Court in *Lindsey* expressed the same sort of sentiment against the arbitrary denial of a state-created right of appeal in the context of a civil case. 405 U.S. at 77, 79.

Indeed, these and related cases, including *Boddie v. Connecticut*, 401 U.S. 371 (1971), are manifestations of the constitutional principle that citizens have a right of access to their courts, just as they have a right to petition other branches of government, and the right of access cannot be arbitrarily denied in cases involving important and fundamental rights.

Returning to the claim of "fundamental fairness," the respondent's brief contends that, because of certain procedures in the trial court, there is only "a negligible risk of error in this case" and that appeals in cases like this are "rarely successful." Resp. Br. 26. The respondent's point is refuted by the cases we cited at pp. 20-21 of our opening brief demonstrating the careful appellate review and the high rate

of reversal in termination cases. Beyond that, in civil cases generally, the Mississippi Court of Appeals reversed or vacated nearly 39% of the trial court decisions it reviewed in 1995 and the Mississippi Supreme Court reversed or vacated nearly 37%. *Supreme Court of Mississippi, 1995 Annual Report*, pp. 22, 41. Particularly in the present case, where the trial judge cited no specific evidence and merely recited the statutory language in his termination order,[1] it is wrong to contend that the risk of error is "negligible." *See, Tricon Metals & Services, Inc. v. Topp*, 516 So.2d 236, 239 (Miss. 1987) (where a case is of any complexity and is hotly contested, the failure of the trial court to make findings of fact will generally be regarded as an abuse of discretion).

Of course, the constitutional issue here turns not on the strength of this particular appeal or the likelihood of reversal, but on whether the petitioner can be denied access to an appellate courthouse open to others, in a case of this importance, simply because she does not have some $2300 to pay in advance. The risk of error in the present case, and the strong possibility of prevailing on appeal if the petitioner were not barred, serve only to illustrate the unfairness of allowing some to appeal the termination of their status as a parent, while closing the courthouse door to those who are unable to come up with the money.

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[1] For example, in repeating the catch-all language of Miss. Code § 93-15-103(3)(e), the Chancellor said that the petitioner was guilty of "serious . . . abuse," Resp. Br. 10-11, *quoting*, Pet. App. 8, 10. However, there was no allegation of abuse in the complaint in this case or at any other stage of the proceedings.

II. A RULING IN THE PETITIONER'S FAVOR WILL NOT OPEN WHAT THE RESPONDENT CALLS A "PANDORA'S BOX" AND WILL NOT REQUIRE STATES TO EXPEND LARGE SUMS OF MONEY SUBSIDIZING "ACTUAL COSTS" OF COURT REPORTERS.

According to the respondent's brief, the State of Mississippi is being asked to "subsidize" the "actual costs" of the appeal in this case. Resp. br. 4, 12. The brief claims: "The petitioner in this case does not seek simply to get a waiver of a filing fee . . . but instead seeks to have the State pay the costs of having the record prepared, including preparation of the transcript by the court reporter." *Id.* 12. A ruling by this Court for the petitioner "would result in potentially huge additional expenses being heaped upon the states," contends the respondent, and a "Pandora's box" would be opened so that states "will be forced to bear the costs of all appeals of indigents in a wide variety of cases." *Id.* 27-28.

The short answer to the State's claim of fiscal undoing is that cost is not a sufficient justification for erecting a dual system of justice in cases involving fundamental rights, with the wealthier able to defend their rights as parents both at the trial court and on appeal if necessary, while the poor are allowed access only to a single proceeding before a single trial judge. But even if cost were an issue, the State of Mississippi vastly overstates the financial impact of a ruling by this Court in the petitioner's favor.

Indeed, the issue in this case does not encompass a filing fee – since it was paid by the petitioner – but instead involves a $2300 plus charge for assembling the trial court record at $2.00 per page both for the non-testimonial pleadings and for the testimonial transcript. Pet. App. 15.

While the State contends that filing fees offset the cost of operating the court system, it does not make the same contention for the $2.00 per page charges. Instead, it merely asserts that these are actual costs that the State would have to pay out of its treasury if impoverished appellants were allowed to appeal terminations of parental rights. Resp. Br. 27.

However, the costs at issue are *not* actual, out-of-pocket expenses the State is required to pay, but instead are expenditures within the State's own control. In terms of the *non-testimonial record*, Mississippi charges $2.00 for each page of the existing pleadings and papers, which are assembled by full-time employees in the Chancery and Circuit Clerk's offices. Miss. Code § 25-7-13(6).[2] However, $2.00 per page is not the actual cost the State incurs. This is clear from contrasting the Mississippi practice with that in the federal courts. While the federal courts require non-indigent appellants to pay for transcripts, Rule 10(b)(4), Federal Rules of Appellate Procedure, they do not require appellants to pay any per page charges for assembling and shipping the existing non-testimonial record from the trial court to the court of appeals. It is simply irrational for the State of Mississippi to preclude indigent parents from appealing a case terminating the fundamental right of parenthood because they cannot pay $2.00 per page to assemble, box, and ship the non-testimonial record.

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[2] The text of § 25-7-13(6) actually deals with record preparation fees charged by clerks in the Circuit Courts. No particular figure for such fees is included in the statute covering Chancery Court Clerks. Miss. Code § 25-7-9. In practice, Chancery Clerks in Mississippi charge the $2.00 per page fees that are statutorily prescribed for Circuit Clerks in § 25-7-13(6). Luther T. Munford, *Mississippi Appellate Practice*, § 7.2 n.10. That is the fee that was charged in this case, which was an appeal from a Chancery Court decision. Pet. App. 15.

As for the *testimonial record*, it also is irrational to preclude indigents in such cases from appealing because of a $2.00 per page fee to print a transcript. This is not a cost that exists through the operation of a free market, but instead arises because Mississippi law requires that court reporters be paid $2.00 per page. Miss. Code §§ 25-7-13(6) 25-7-89. Mississippi law also requires that court reporters be paid $2.00 per page for a transcript in an indigent appeal in a criminal case. Miss. Code § 25-7-13(4). But some states do not charge that much. *See, e.g.*, R.I. Superior Ct. R. Civ. Pro. 78 ($1.00 per page). Certainly, if it chose to save the money, Mississippi could charge less and pay court reporters less for transcripts generally, or specifically for pauper transcripts.

In Mississippi, each trial judge has an official court reporter, and under Mississippi law, that reporter is an officer of the court and an employee of the State. Miss. Code §§ 9-13-1, 9-13-5. The reporter is paid an annual salary of $33,000. Miss. Code § 9-13-19. Under current practice, that court reporter also has a monopoly on all trial transcripts that are ordered from cases in that court, for which the reporter is paid $2.00 per page over and above the $33,000 annual salary. Miss. Code § 25-7-89. But if it chooses to save money, the State can alter that practice, even slightly. Just as attorneys are officers of the court and are sometimes required to render services for no compensation or for a reduced fee, *see, e.g.*, Rules 39.6-39.7 of the Rules of this Court (attorneys appointed in civil cases are reimbursed for travel expenses, but no provision exists for payment of fees), Miss. Code § 99-15-17 (appointed attorneys in felony cases receive a maximum fee of $1,000), so court reporters in Mississippi are officers of the court, and the State can require that they provide certain services to indigents without charge or at reduced rates. *See, e.g.*, Tex. R. App. Proc. 53(j) (court reporters are paid for transcripts for indigents in criminal cases, but must provide them without pay for indigents in

civil cases); W.Va. Code §§ 51-7-7, 59-2-1(a)(3) (same).

In addition, the economics of modern-day court reporting suggest that $2.00 per page is not a realistic cost of the service performed. With computer-aided transcription, sometimes called realtime technology, the court-reporter's stenographic notes are captured on a computer disk which converts the notes into an instant text and transcript. *See,* Hewitt and Levy, *Computer-Aided Transcription: Current Technology and Court Applications*, National Center for State Courts (1994). Over 90% of the court reporters in the United States now use computer-aided transcription. *Realtime Facts*, National Court Reporters Association brochure (1996). Thus, the labor involved in producing a transcript includes being present and taking the stenographic notes during the trial, for which the court reporter is paid a salary, and then, once a transcript is ordered for appeal, reviewing and correcting the text that has been automatically produced. This additional reviewing and correcting is not an expensive proposition, and $2.00 per page is a rather high amount to charge for it. While the State of Mississippi is certainly free to charge $2.00 per page to those who can afford the price, it is not proper for the State to shut the appellate courthouse door to indigent litigants in parental termination cases on the pretense that $2.00 per page is the "actual cost" of the services involved.

Whatever the State chooses to pay per page for an indigent transcript, the money often can be recouped. In Mississippi, if an appellant prevails on appeal, the costs of the transcript are generally taxed against the opposing party, who can then reimburse the State in cases involving indigent appellants. Rule 36, M.R.A.P.

In sum, the sole interest proffered by the State in support of excluding poor people from in forma pauperis appeals in

parental termination cases -- the "actual costs" it will have to pay from the treasury, Resp. Br. 27 -- is simply not a real interest and is not something beyond the State's control. It does not justify a wholesale refusal of the appeals of poor people in parental termination cases.

Apart from its "actual costs" contention, the State of Mississippi argues in this Court that a ruling for the petitioner in the present case will open a "Pandora's box" that "would arguably include all domestic relations matters such as divorce, paternity, and child custody, as well as other cases where 'important' interests are being litigated." Resp. br. 28. However, this Court's prior Fourteenth Amendment precedents do not justify this concern. The Court has held that appointment of counsel will sometimes be required in parental termination cases, *Lassiter*, 452 U.S. at 31-32, but has never come close to holding that counsel is required in paternity or other domestic relations cases. The Court has held that a clear and convincing standard of proof is required in parental termination cases, *Santosky v. Kramer*, 455 U.S. 745 (1982), and civil commitment cases, *Addington v. Texas*, 441 U.S. 418 (1979), but has not extended that standard to a wide panoply of other civil actions. This Court can resolve the issue in the present case based upon the interest here -- that of a parent whose relationship with her child is being terminated by a Chancery Judge in Mississippi -- without necessarily holding that indigents have a right to in forma pauperis appeals in other civil actions of a lesser magnitude.

It is not clear if the State is attempting to suggest that the interests in "all domestic relations matters," resp. br. 28, are as important as those in parental termination cases, but surely that is not the case. A termination of parental rights takes on a permanence and exclusion that is not present in other domestic relations matters. People who are divorced can still see each other and can even marry each other again

if they choose. A parent who loses custody of a child generally can visit the child, can remain a parent to the child, can be a part of the child's life, and can even petition to regain custody if circumstances change. But a termination of parental rights means the parent is no longer a parent, and no longer has a right even to see and visit with the child. In *Santosky*, the Court recognized that people have a more compelling interest in preventing the finality of a "forced dissolution of . . . parental rights" than they do in preventing adverse consequences stemming from domestic relations litigation that affects "ongoing family affairs" but falls short of parental termination. 455 U.S. at 753. Termination cases are unlike other civil actions in the sense that "[o]nce affirmed on appeal, a . . . decision terminating parental rights is *final* and irrevocable." *Id.* at 759 (emphasis in original).

Thus, it is simply wrong to suggest, as does the State's brief, that a reversal of the Mississippi Supreme Court by this Court will "result in potentially huge additional expenses being heaped upon the states." Resp. br. 4. Even if, for some reason, this Court held in the present case that in forma pauperis appeals were required in all domestic cases, that would not be a major burden on the states. As we noted in our opening brief, many states presently provide for in forma pauperis appeals, including transcripts, in all types of civil cases without suffering financial chaos. Pet. Br. 26.

At any rate, in terms of parental termination cases, it is clear the financial burden on states like Mississippi is minimal when compared to the importance of access to the courts in a case of this magnitude.

III. THE STATE OF MISSISSIPPI IS WRONG TO SUGGEST THAT THE RELEVANT FOURTEENTH AMENDMENT PRINCIPLES HAVE NO BEARING BECAUSE THIS IS A CIVIL CASE.

Even though the Fourteenth Amendment prohibits the states from limiting appeals in criminal felony and misdemeanor cases to those who can afford transcripts, the State of Mississippi strenuously urges that this principle should never be extended beyond the realm of criminal litigation. Resp. br. 4, 14-22, 24-25. In so doing, the State suggests an unbreachable wall between criminal and civil cases in terms of the Fourteenth Amendment's coverage of access for poor people to the courts of this land. Of course, no such wall exists, and if any ever did, it was traversed as long ago as *Boddie v. Connecticut*, 401 U.S. 371 (1971). There, Justice Harlan's opinion for the Court, coming in a civil case, relied upon the principles expressed in the criminal case of *Griffin v. Illinois*, noting that "[i]n *Griffin* it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process" and adding that "the rationale of *Griffin* covers this case." 401 U.S. at 382. *Lindsey v. Normet* also cited *Griffin* in the application of the Fourteenth Amendment to a civil appeal and, in striking down the Oregon statute at issue, specifically relied upon the fact that the statute had the effect of precluding poor people from access to appellate courts. 405 U.S. at 77, 79.

What is important in Fourteenth Amendment analysis is the gravity of the interest involved, and while compelling interests are often implicated in criminal cases, the fact that a case is labeled "criminal" or "civil" does not end the inquiry. *Compare, Lassiter v. Department of Social Services*, 452 U.S. at 31-32 (counsel will sometimes be constitutionally required in parental termination cases, which are civil) with *Scott v. Illinois*, 440 U.S. 367 (1979) (counsel is never

constitutionally required in a criminal case for a misdemeanor offense that will not lead to imprisonment). Indeed, if this Court had drawn the unbreachable line between civil and criminal cases that the State now urges, *Lassiter* would never have been resolved as it was, but instead this Court would have held that no indigent litigant in a termination case ever has a right to counsel because termination cases are civil and not criminal. In fact, none of the Justices in *Lassiter* adopted the position now urged by the State of Mississippi. Instead, the five-member majority held that the Fourteenth Amendment will require counsel in some parental termination cases and not others, while the four dissenters contended that counsel should be provided in all cases.

The State acknowledges the precedent set by *Boddie*, but contends that "[t]he decision in *Boddie* represents the outer limits of indigent court access in civil law." Resp. Br. 16. It is not clear what is meant by this phrase, but the State bases its contention to this effect in part on its view that *Lassiter* held that a refusal to appoint counsel in a termination case would not violate the Due Process Clause. Resp. Br. 16. Actually though, as just mentioned, *Lassiter* held that due process sometimes will and sometimes will not require appointment of counsel in termination cases. As for *Lindsey v. Normet*, the State argues that if *Lindsey* had indicated the applicability of *Griffin's* principles to civil appeals, *Lassiter* would have been decided differently and appointment of counsel would always be required in termination cases. Resp. Br. 17. In this sense, the State simply misunderstands the difference between the right to counsel and the far broader right of access to courts without arbitrary preclusion. *See*, Pet. Br. 29-30. Indeed, at one point in its brief, the State cites as support for its position the statement in *Lassiter* that no attorney was required in that case because there were no troublesome points of law. Resp. Br. 26, *citing, Lassiter*, 452 U.S. at 32. This misses the fact that in the present case, the

petitioner is not asking for appointment of counsel to navigate troublesome points of law, but instead simply seeks to enter the same appellate courthouse door that is open to others so she can present her case for the restoration of her rights as a parent.[3]

We are not arguing here that civil cases must be treated exactly like criminal cases. We need not contend, for example, that transcripts must be provided in all or nearly all civil appeals, major and minor, just as they must be provided in nearly all criminal appeals. Instead, we contend that it is necessary to look beyond the civil or criminal label and analyze the importance of the interest at issue. This Court has said that a misdemeanor defendant faced with a $500 fine and no jail time must be provided a transcript because of the importance of the interest involved. *Mayer v. City of Chicago*. Surely, the interest here is far more substantial, implicating fundamental rights stemming from the termination of a parent's relationship with her child -- one of the most important interests that can be adjudicated in a court of law, and certainly the most important in a civil court. Just as the appellant's indigency was not a sufficient reason to prohibit his appeal in *Mayer*, the financial status of the petitioner here is not a valid basis for shutting the appellate courthouse door and leaving her outside.

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[3] As we noted in our opening brief, *United States v. Kras*, 409 U.S. 434 (1973), and *Ortwein v. Schwab*, 410 U.S. 656 (1973) do not control here since the underlying disputes in those cases did not implicate fundamental rights and the amounts charged were not of the magnitude in the present case. Pet. Br. 16-17, 30. As for the Courts of Appeals cases cited by the respondent, Resp. Br. 17, all specifically relied upon the absence of a fundamental right. With respect to the respondent's frequent citation to decisions of this Court in the area of welfare and other government benefits, Resp. Br. 12-13, 29-33, those a far cry from the type of access to the courts issues that arise in the present case, where the petitioner has been deprived of her relationship with her children.

IV. EVEN THOUGH MISSISSIPPI CHARGES THESE SAME TYPES OF FEES AND COSTS TO ALL CIVIL APPELLANTS, THEIR IMPOSITION IN THIS CASE, PRECLUDING AN INDIGENT PARENT FROM PURSUING AN APPEAL OF A TERMINATION OF PARENTAL RIGHTS THAT IS AVAILABLE TO THOSE WITH MORE MONEY, VIOLATES THE EQUAL PROTECTION CLAUSE.

Because the Mississippi Supreme Court requires all civil appellants to pay these fees and costs, the State contends that Mississippi does not bear any animus toward indigents or intend to single them out. Resp. br. 31. "This alone resolves the equal protection issue," according to the State. *Id.* As Anatole France wrote in *Crainquebille:* "The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, or to steal bread -- the rich as well as the poor."

This Court's equal protection cases involving access to justice have suggested that indigents are, in fact, "singled out" when they are "denied meaningful access to the appellate system because of their poverty." *Ross v. Moffitt*, 417 U.S. at 611. As noted in *Griffin v. Illinois*, the preclusion of an appeal in that case through denial of a transcript was discrimination "on account of poverty." 351 U.S. at 17. In the *Griffin* line of cases, there was no need to show any further animus toward the poor. Similarly, in *Lindsey v. Normet*, this Court struck down the Oregon double-bond eviction appeal requirement in part because "[t]he discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious." 405 U.S. at 79.

Indeed, when state officials impose a fee as a condition for access to a branch of government, such as a court, they do

it with the design of precluding those who are either unwilling or unable to pay the fee. Through in forma pauperis procedures, such as affidavits, courts can distinguish those who are simply unwilling from those who are unable. When a state refuses to permit an in forma pauperis exception to a fee requirement, it clearly intends to keep out those who are unable to pay.

In determining the level of scrutiny in equal protection analysis, this Court has looked to the importance of the interest involved and the nature of the class that is targeted. *See, Romer v. Evans*, 134 L.Ed.2d 855, 865 (1996). Although the analytical scheme is anchored by the opposing poles of strict scrutiny and rational basis review, the Court's decisions do allow for some intermediate flexibility when interests and classes do not neatly fit within one extreme or the other. *See, e.g., United States v. Virginia*, 64 U.S.L.W. 4638 (1996).

One fundamental interest at issue here is the interest in equality of access to the courts, an ideal that has occupied an important role in this Court's Fourteenth Amendment analysis over the years, from *Griffin* to *Boddie* to *Lindsey v. Normet.* The underlying nature of this interest was expressed in a somewhat, but not altogether, different context in this Term's decision in *Romer v. Evans*:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . A law declaring in general that it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

134 L.Ed.2d at 866-867.

In addition to that interest, the present case also includes what this Court has called the "commanding," *Lassiter*, 452 U.S. at 27, and "fundamental," *Santosky*, 455 U.S. at 753, interest that a parent has in retaining the relationship with his or her children.

In terms of the class that is affected, the State of Mississippi correctly points to this Court's decision in *Harris v. McRae*, 448 U.S. 297 (1980) for the proposition that poor people are not *per se* a suspect class. Resp. Br. 31. *Harris* specifically stated that "poverty, *standing alone*, is not a suspect classification." 448 U.S. at 323 (emphasis added). But when the status of poverty is combined with measures that shut people off from means to affect their government in cases involving otherwise important interests, as in *Griffin* and *Boddie*, the Court has carefully scrutinized those measures and generally has struck them down.[4]

These cases are similar, in some sense, to the candidate filing fee cases. For example, in *Bullock v. Carter*, 405 U.S. 134 (1972), this Court held that it must "closely scrutinize" local election candidate filing fees that ranged into the thousands of dollars because such a fee "falls with unequal weight on voters, as well as candidates, according to their economic status." *Id.* at 144. After closely scrutinizing that scheme, the Court struck down its application to indigents who could not afford the fee, and it did the same thing two years later with a $700 candidate filing fee in *Lubin v. Panish*, 415 U.S. 709 (1974). While those cases involved the right to vote, and were analyzed under the First Amendment as well as the Equal Protection Clause of the Fourteenth

[4] Of course, *Boddie* is a due process and not an equal protection case. It is cited here simply to illustrate the importance that this Court has attached when this combination of interests and status has come together.

Amendment, the parallels are important. Just as states are said not to be required by the federal constitution to provide appellate courts, they are also not constitutionally required to select all local governmental officials through popular elections. Yet once the states do so, and if important rights are involved, this Court has looked carefully at whether citizens are shut out from participating in their government because of their poverty.

For all of these reasons, and contrary to the respondent's contention, something more than minimal scrutiny is required here. The State's justification for denying in forma pauperis appeals in termination cases must be compelling, or at the very least substantial, before the Mississippi Supreme Court's judgment can be upheld. But as we explained in Section II of this brief, the State's interest here does not even meet the requirement of rationality, much less the requirement of a compelling or persuasive justification.

In *Romer*, this Court referred to "a denial of equal protection of the laws in the most literal sense." 134 L.Ed.2d at 867. The Equal Protection Clause reads: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The protection of the laws in Mississippi includes the right to appeal a termination of parental rights and to correct an injustice in such a case if one occurs. Given the importance of that interest, and the fact that the appeal is denied to poor people like the petitioner when a fee of this magnitude is charged as a prerequisite, the protection of the laws is not "equal." The Mississippi Supreme Court's judgment is contrary to the Fourteenth Amendment.

CONCLUSION

For these reasons, and for those stated in the opening brief, the judgment of the Supreme Court of Mississippi should be reversed.

Respectfully Submitted,

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(5)

No. 95-853

In The

Supreme Court of the United States

October Term, 1995

M.L.B.,

Petitioner

vs.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN S.L.J. AND M.L.J, AND HIS WIFE, J.P.J.,

Respondents

On Writ of Certiorari
To The Supreme Court of Mississippi

BRIEF OF AMICI CURIAE NATIONAL CENTER FOR YOUTH LAW, YOUTH LAW CENTER, and NORTHWEST WOMEN'S LAW CENTER, IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae National Center for Youth Law, Youth Law Center, and Northwest Women's Law Center, non-profit public interest law organizations focusing on the rights of children and women, submit this brief with the consent of petitioner and respondents.[1]

The question presented by this case implicates fundamental constitutional rights, not only of parents involved in proceedings to terminate parental rights, but also of the children whose lives are profoundly affected by termination proceedings. This *amicus* brief is submitted to urge the Court to take account of the constitutionally protected interests of children in deciding this case.

1. National Center for Youth Law

The National Center for Youth Law [NCYL] is a non-profit public interest law center, providing litigation support, technical assistance, and training to attorneys and other professionals on issues affecting low-income children and families. NCYL also engages in policy analysis, and administrative and legislative advocacy, on both state and national levels. NCYL's areas of expertise include foster care and protection of children from abuse and neglect, children's health and mental health, and public benefits. NCYL attorneys have served as lead counsel in two statewide class-action cases concerning reform of foster care. *Angela R. v. Clinton*, 999 F.2d 320 (8th Cir. 1993); *David C. v. Leavitt*, No. 93-C-206W (D.Ut., filed Feb. 25, 1993). NCYL has been involved in advocacy efforts focused on

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[1] Written consents from petitioner's and respondents' counsel are on file with the Clerk of the Court.

procedural safeguards and due process for children and families involved in abuse/neglect, dependency and termination of parental rights proceedings, including *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 102 S.Ct. 2153 (1981), *Davis v. Page*, 714 F.2d 512 (5th Cir. 1983), and *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974).

2. Youth Law Center

The Youth Law Center is a national, non-profit public interest law firm based in San Francisco, California. Founded in 1978, it has provided legal education, representation, and reform of laws relating to children and youth. For more than eighteen years, Youth Law Center attorneys have provided research, training, and technical assistance to public officials, attorneys and child advocates in virtually every state on legislation and public policy concerns involving juvenile justice, child welfare and children's health. The Youth Law Center has also represented children and youth in civil rights litigation in California and at least seventeen other states.

3. Northwest Women's Law Center

The Northwest Women's Law Center [NWLC] is a non-profit public interest organization dedicated to protecting the legal rights of women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, NWLC has worked actively on all fronts to protect and advance the legal rights of women and children throughout Washington state and the Pacific Northwest. NWLC attorneys have represented women in numerous cases where the issue has been the right of access to the courts. Most recently NWLC filed an amicus brief urging the Montana Supreme Court to provide victims of sexual abuse access to the courts against all parties

responsible for their abuse. The Montana Supreme Court held for the plaintiff and issued a ruling that will help adult survivors of sexual abuse gain access to legal remedies. NWLC also has lobbied in Washington state and nationally for legislation to extend protection for domestic violence victims as well as for legislation that protects women's health and reproductive freedom. Furthermore, the Law Center has joined numerous amicus briefs to the United States Supreme Court on the issue of reproductive freedom.

SUMMARY OF ARGUMENT

In deciding whether provisions for *in forma pauperis* appeals of terminations of parental rights are constitutionally required, this Court should consider not only the fundamental rights of parents, but the fundamental rights of children to a parent-child relationship.

The basic procedural safeguard of an appeal is crucial to ensure the fairness and accuracy of termination proceedings, not only to protect parents from wrongful deprivation of their parental rights, but also to protect the children involved from a traumatic and irrevocable severing of their most intimate familial relationship when termination is not justified under the state's statutory standard. Thus, Mississippi's failure to make an appeal available in all cases, without regard to the parent's ability to pay, violates the children's as well as the parent's constitutional rights of due process.

Moreover, a rule such as Mississippi's, that conditions the right to appeal a termination of parental rights on the parent's ability to pay, is also constitutionally suspect on equal protection grounds. Mississippi, in effect, favors one class of children--those whose parents have enough money to pay the costs of appeal--with a safeguard against wrongful deprivation of their right to an ongoing parental relationship, and arbitrarily denies this safeguard to another class of children--those whose parents are indigent.

ARGUMENT

Provisions for *in forma pauperis* appeals of terminations of parental rights are necessary to protect the constitutional due process and equal protection rights of children, as well as parents.

An order granting termination of parental rights has far more drastic consequences for children than a court order governing the legal and physical custody of a child. Termination of parental rights permanently and irrevocably severs the child's rights to any future visitation, care, contact, or relationship with the parent. In most states, including Mississippi, termination ends the child's right to financial support from the parent, and the right to inherit upon the parent's death. As dramatically illustrated by the Chancery Court's order in this case, termination of parental rights would remove all traces of these children's mother from their lives -- even to the extent of removing her name from their birth certificates and replacing it with the name of their stepmother.

Thus, a termination of parental rights is the most extreme form of the state's exercise of its *parens patriae* power to intervene in familial relationships. When state intervention implicates fundamental rights of family integrity, for both children and parents, procedural safeguards to ensure fairness and guard against error are essential. *Santosky v. Kramer*, 455 U.S. 743, 102 S.Ct. 1388 (1982).

The drastic nature of termination of parental rights is highlighted in this case by the ages of the children involved and their custodial history. S.L.J. and M.L.J. (named after respondent and petitioner) were, respectively, nine and seven years old at the time of the Chancery Court's 1994 order

terminating their mother's parental rights. They had lived with their mother and father from birth until their parents' divorce in 1992. Thereafter, the children spent three months in their father's sole custody, and then about two years in the custody of their father and stepmother, before the termination petition was granted.

The Chancery Court made no findings regarding the nature of the relationship between petitioner and her children, or the consequences for the children of severing that relationship. It is very likely, however, that close emotional ties existed between petitioner and her children, and that the absolute and permanent severing of these ties has caused them emotional harm. Almost all children form intense bonds with their parents in the early years of development -- regardless of the adequacy or inadequacy of their parenting -- and children inevitably suffer some harm from severing these bonds, such as difficulty in forming attachments to future caregivers, and developmental and educational setbacks. *See, e.g.*, National Commission on Children, *Beyond Rhetoric: A New American Agenda for Children and Families* 282-283 (1991) [hereinafter *Beyond Rhetoric*]; American Bar Association, *America's Children at Risk*, 45-46 (1993).

Of course, in some cases the harms attendant upon severing a parent-child relationship are outweighed by the risks to the child of continuing that relationship, risks such as physical or sexual abuse. But the fact remains that termination of parental rights is a drastic step that should only be undertaken with clear and substantial justification, and that it involves a substantial deprivation of a child's fundamental rights and interests--material, developmental, and psychological--in preserving an existing parent-child relationship.

Recognizing the gravity of the interests at stake, Mississippi

has established that termination of parental rights may only be granted upon a showing, by clear and convincing evidence, of abandonment, abuse, or parental unfitness. Miss. Code Ann., Sections 93-15-103, 93-15-109.

Mississippi has also granted an appeal as of right to ensure that this standard is fairly and properly applied. Miss. Rules of Appellate Procedure, Rules 16, 17. Appellate review of termination cases is crucial, to ensure that children are not wrongfully deprived of their fundamental right to a parent-child relationship through error or bias in the trial court's application of the stringent legal standard for termination. Since children themselves have no right to representation by counsel in termination proceedings, or to appeal, the *only* protection of their fundamental rights is through the *parent's* right to appeal.

It is unfortunately common, as in this case, for children to be caught in the midst of bitter disputes between divorced parents. In this case, it appears that a major basis for the termination petition was an allegation that the mother had failed to maintain regular visitation. The mother, in turn, alleged that the father had unreasonably interfered with her visitation rights--an allegation that is not addressed at all in the Chancery Court's decision. Such highly contested evidentiary disputes are typical of termination of parental rights cases.

Moreover, the courts that adjudicate terminations of parental rights often work under intense time and caseload pressures. *See State Court Caseload Statistics: Annual Report 1991* (State Justice Institute, Feb. 1993); Carol R. Flango, *A Statistical View of the Divorce Caseload in the Nation's State Courts*, State Ct. J. 6-7 (Fall 1992); *Beyond Rhetoric*, at 283. Parties in termination of parental rights cases often appear without benefit of counsel, and the children themselves, in

many states including Mississippi, have no right to be heard or to representation by counsel, even though their fundamental rights are at stake.

The substantial danger of hasty and erroneous adjudications jeopardizing the fundamental rights of children is graphically illustrated by another recent Mississippi case, *Chrissy F. by Medley v. Mississippi Dep't of Public Welfare*, 780 F.Supp. 1104 (D.Miss. 1991), *aff'd in part*, 995 F.2d 595 (5th Cir. 1993). In this case, like petitioner's, the Mississippi Chancery Court was obliged to resolve a bitter dispute between parents over the custody of a child. The Chancery Court's handling of the case was so patently inadequate that the child ultimately sought relief through a civil rights action in federal district court. The district court, after trial, found that the Chancery Court and Youth Court judges had violated the child's constitutional right of access to the courts by conducting crucial proceedings without keeping any record or transcript of the proceedings, and without notifying the child's guardians ad litem, thus "subjecting [the child] to a proceeding which fell woefully short of those basic features which mark an adequate adjudicatory proceeding." *Id.*, at 1126-1127.

Given the substantial risks of error or inadequate adjudication at the trial court level, the safeguard of an appeal is crucial to protect the fundamental rights of children involved in termination of parental rights cases. Children should not, as a matter of constitutional due process, be deprived of this basic safeguard, simply because of their parent's inability to pay for transcripts and fees.

Also, under Mississippi law, while children whose parents can afford to pay for transcripts and fees have access to an appeal, children whose parents cannot afford these costs (here, the appeal costs were over $2000) are arbitrarily

denied this basic procedural safeguard.

It is well established that treatment prejudicial to the interests of a class of children, based solely on the actions or characteristics of their parents, is constitutionally suspect on equal protection as well as due process grounds. *See, e.g., Plyler v. Doe*, 457 U.S. 189, 102 S.Ct. 2382 (1982); *King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128 (1968).

CONCLUSION

This Court should hold that Mississippi's failure to make any provision for *in forma pauperis* appeals, in cases implicating the fundamental right of family integrity, violates the constitutional due process and equal protection rights of both the parents who are denied the opportunity to appeal, and the children whose most intimate and fundamental family relationship is severed forever, by the order of a single judge, with no chance for review, and no safeguard against error.

Respectfully Submitted

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